NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

Congressional Information Service,
Washington, D.C.

S. HRG. 100-1009 PT. 4

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST AND SECOND SESSIONS

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL JUDICIARY AND THE DEPARTMENT OF JUSTICE

OCTOBER 26, NOVEMBER 5, 13, 17, DECEMBER 9, 1987, AND FEBRUARY 25, 1988

Part 4

Serial No. J-100-8

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

96-183 WASHINGTON : 1989

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-37

COMMITTEE ON THE JUDICIARY

JOSEPH R. BIDEN, JR., Delaware, *Chairman*

EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DECONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

STROM THURMOND, South Carolina
ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
GORDON J. HUMPHREY, New Hampshire

MARK H. GITENSTEIN, *Chief Counsel*
DIANA HUFFMAN, *Staff Director*
DENNIS W. SHEDD, *Minority Chief Counsel*

CONTENTS

MONDAY, OCTOBER 26, 1987

STATEMENTS

	Page
Heflin, Hon. Howell	1
Karnes, Hon. David R	2
Smith, Hon. Virginia, Representative from Nebraska	4
Exon, Hon. J. James	6
Lautenberg, Hon. Frank R	33
Bradley, Hon. Bill	33

TESTIMONY OF NOMINEES

Beam, Hon. C. Arlen, to be U.S. circuit judge, Court of Appeals, Eighth Circuit	7
Politan, Nicholas H., to be U.S. district judge, District of New Jersey	34
Webb, Rodney S., to be U.S. district judge, District of North Dakota	39

QUESTIONNAIRES AND OTHER SUBMISSIONS

Beam, Hon. C. Arlen:	
Response to questions	13
Enclosures	19
Letter from the American Bar Association	62
Biography	63
Questionnaire	64
Politan, Nicholas H.:	
Response to questions	38
Letter from the American Bar Association	114
Biography	115
Questionnaire	116
Smith, Hon. Virginia: Résumé of Judge Beam	5
Webb, Rodney S.:	
Response to questions	45
Letter from the American Bar Association	155
Biography	156
Questionnaire	157

THURSDAY, NOVEMBER 5, 1987

STATEMENTS

Heinz, Hon. John	191
Specter, Hon. Arlen	192
Wilson, Hon. Pete	193

TESIMONY OF NOMINEES

Van Antwerpen, Hon. Franklin S., to be U.S. district judge, Eastern District of Pennsylvania	196
Turner, Jerome, to be U.S. district judge, Western District of Tennessee	199
Siegan, Bernard H., to be U.S. circuit judge, Ninth Circuit	202

Page

QUESTIONNAIRES AND OTHER SUBMISSIONS

Siegan, Bernard H.:
List and letters of endorsements 208
Response to questions 240, 258
Biography 346
Questionnaire 347
Supplement 383
Turner, Jerome:
Letter from the American Bar Association 291
Biography 292
Questionnaire 293
Van Antwerpen, Hon. Franklin S.:
Letter from the American Bar Association 271
Biography 272
Questionnaire 273

FRIDAY, NOVEMBER 13, 1987

STATEMENTS

Leahy, Hon. Patrick J 407
Armstrong, Hon. William L 408
Brown, Hon. Hank, Representative from Colorado 410
Prepared statement 413
Bradley, Hon. Bill 464
Lautenberg, Hon. Frank 465
Rinaldo, Hon. Matthew J., Representative from New Jersey 469
Gramm, Hon. Phil 477
Bentsen, Hon. Lloyd 517

TESTIMONY OF NOMINEES

Miller, Robert N., to be district judge, District of Columbia 418
Trott, Stephen B., to be circuit judge, Ninth Circuit 472
Wolin, Hon. Alfred M., to be U.S. district judge, District of New Jersey 509
Cummings, Samuel R., to be district judge, Northern District of Texas 514

WITNESS

Markman, Stephen J., Assistant Attorney General for Legal Policy, U.S. Department of Justice 459

QUESTIONNAIRES AND OTHER SUBMISSIONS

Cummings, Samuel R.:
Response to questions 519
Biography 630
Questionnaire 631
Letter from the American Bar Association 651
Lautenberg, Hon. Frank: Letter of endorsement of Judge Wolin 467
Leahy, Hon. Patrick J.:
Letter of reprimand and response of Robert N. Miller 419
Chronology of reprimand 430
Miller, Robert N.:
Response to questions of Senator Thurmond 451
Biography 521
Questionnaire 522
Trott, Stephen B.:
Response to questions 484
Biography 543
Questionnaire 544
Letter from the American Bar Association 593
Wolin, Hon. Alfred M.:
Response to questions 512
Questionnaire 594
Letter from the American Bar Association 629

Page

TUESDAY, NOVEMBER 17, 1987

STATEMENTS

Leahy, Hon. Patrick J 653
Heinz, Hon. John 654
Danforth, Hon. John C 656
Conte, Hon. Silvio O., Representative from Massachusetts 658
Bond, Hon. Christopher S 660

TESTIMONY OF NOMINEES

Gawthrop, Hon. Robert S., III, to be district judge, Eastern District of Pennsylvania 661
Whipple, Hon. Dean, to be U.S. district judge, Western District of Missouri 667
Harrington, Edward F., to be U.S. district judge, District of Massachusetts 672
Rose, William S., Jr., to be Assistant Attorney General, Tax Division, Department of Justice 678

QUESTIONNAIRES AND OTHER SUBMISSIONS

Gawthrop, Hon. Robert S., III:
- Biography 687
- Questionnaire 688
- Letter from the American Bar Association 713

Harrington, Edward F.:
- Response to questions 677
- Biography 762
- Questionnaire 763
- Letter from the American Bar Association 788

Rose, William S., Jr.:
- Memorandum, list of cases and companies that would require recusal 680
- Response to questions 684
- Questionnaire 789

Whipple, Hon. Dean:
- Response to questions 671
- Biography 714
- Questionnaire 715
- Letter from the American Bar Association 761

WEDNESDAY, DECEMBER 9, 1987

STATEMENTS

D'Amato, Hon. Alfonse 895
Moynihan, Hon. Daniel Patrick 897

TESTIMONY OF NOMINEES

Harrington, Edward F., to be U.S. district judge, District of Massachusetts 889
Conboy, Kenneth, to be U.S. district judge, Southern District of New York 900

WITNESSES

Panel consisting of Hon. Douglas P. Woodlock, U.S. district judge, U.S. District Court, Boston, MA; Edward Hanify, attorney, Ropes & Gray, Boston, MA; Janis M. Berry, attorney, Boston, MA; and Walter Prince, attorney, Brown & Prince, Boston, MA 839
Panel consisting of Alice E. Richmond, attorney, Hemenway & Barnes, Boston, MA; and Richard Donahue, attorney, Donahue & Donahue, Boston, MA 861
Carfora, Fred, former deputy commissioner, New York Department of Environmental Protection, New York, NY 905

QUESTIONNAIRES AND OTHER SUBMISSIONS

Berry, Janis M.:
- Testimony 849
- Prepared statement 851

Page

Berry, Janis M.—Continued
Letter supporting nominee 854
Carfora, Fred:
Testimony 905
Article entitled "How To Tell a Journalist From a Hitman," by Murray Kempton 913
Conboy, Kenneth:
Letter to Commissioner Schultz, giving details of the Carfora case 916
Biography 926
Questionnaire 929
Letter from the American Bar Association 945
Donahue, Richard: Testimony 884
Hanify, Edward B.:
Testimony 843
Prepared statement 845
Harrington, Edward F.:
Letters from:
Michael C. Donahue 947
Thomas Moran 951
George F. Kelly 953
Affidavit of Virginia McNiff 954
Statement of Charlotte Power 957
Letters from:
Cornelius J. Moyniham, Jr 960, 961
John M. Callahan 962
Jeremiah T. O'Sullivan 965
David Margolis 966
Gerald E. McDowell 967
Prepared statement 968
Earle C. Cooley 973
S. Beville May 974
Leslie K. Peterson 975
Additional questions by Chairman Biden 977
Responses 1000
Letter from Stephen R. Delinsky 981
Articles entitled:
"State-Federal Feud Hurts Crime-Fighting Efforts," by David Farrell. 982
"DAs Go for Shannan Over Ted Harrington," by Peter Lucas, Boston Herold 984
"Shannon Cleans Up," by Peter Lucas, Boston Herold 984
"Four Victims of Bay State Political Vengeance," by David Farrell 995
"Changing of the Guard," by David Farrell 996
"Bellotti Scuttles a Judgeship" 997
"Bellotti Allies Oppose Harrington Judgeship," by David Farrell 998
Prince, Walter:
Testimony 857
Prepared statement 858
Richmond, Alice E.:
Testimony 861
Prepared statement 865
Letter of clarification by Daniel G. Harrington 879
Article entitled "Prosecutor as Witness—Blaikie Defense Airs Strategy," By Richard Connolly 882
Woodlock, Hon. Douglas P.:
Testimony 839
Letter of support for Edward F. Harrington 840

THURSDAY, FEBRUARY 25, 1988

STATEMENT

Thurmond, Hon. Strom 1135

TESTIMONY OF NOMINEE

Siegan, Bernard H., to be U.S. circuit judge, Ninth Circuit 1147

Page

WITNESS

Pierce, Hon. Samuel R., Jr., Secretary of Housing and Urban Development 1137

ADDITIONAL SUBMISSIONS

Hatch, Hon. Orrin G.:
Letter from The University of Chicago Law School 1344
Article entitled "Model for Siegan Is Kozinski, Not Bork," by John Dentinger, Wall Street Journal 1345
Leahy, Hon. Patrick J.:
Letters submitted regarding the nomination of Bernard Siegan:
Opposed 1017
In favor 1077
Letter from Lynn M. Nelson 1099
Two reports presented by numerous organizations 1100, 1112
Letters in opposition to nominee:
Tom Bradley 1129
Louise H. Renne 1131
Terry Goddard 1132
Article entitled "Precedent for Lower Courts: Tyrant or Teacher," by Linda Greenhouse, New York Times 1169
Resolution in opposition to nominee 1170
Letters from:
David C. Fathi 1172
Michael A. Pelavin 1174
California congressional delegation 1175
Warren E. Burger 1178
Letter and list of law professors in opposition to nominee 1182
Prepared statement of John H. Buchanan, Jr., People for the American Way Action Fund 1187
Report 1194
Letters from:
Monroe Citizens for Public and Religious Liberty, Rochester, NY 1234
Justice William A. Newsom, California Court of Appeal 1235
School of Law, University of Texas at Austin 1236
California Federation of Business and Professional Women, Greater South Bay Chapter 1240
Earl B. Gilliam Bar Association of San Diego County 1242
Coalitions for America 1243
California Women Lawyers 1245
National Organization for Women, Inc 1247
Senators Matsunaga, Cranston, and Adams 1249
George Mason University 1251
Jewish Community Relations Council 1255
Southwestern University 1256
Harvey Mudd College, Clarement, CA 1258
Religious Coalition for Abortion Rights 1259
Herbert Brownell, Lord, Day & Lord 1261
University of San Diego 1263
Emory University, Atlanta, GA 1265
Hudson Institute, Alexandria, VA 1266
Southwestern University, Los Angeles, CA 1268
Social Philosophy Policy Center, Bowling Green, OH 1269
Letters from:
Jewish Federation of Greater Toledo 1272
University of Puget Sound, Tacoma, WA 1273
George Mason University 1274
Dickinson School of Law, Carlisle, PA 1278
John Marshall Law School, Chicago, IL 1281
National Commission on Correctional Health Care 1282
Washington University, St. Louis, MO 1285
Article from The Journal of Law & Economics, University of Chicago Law School, entitled "The Economics of Enforcement of and Antidiscrimination Law: Title VII of the Civil Rights Act of 1964," by Andrea H. Beller 1348
Press release by Senator Max Baucus 1370

Page

Leahy, Hon. Patrick J.—Continued
Letters from:
Florida State University, Tallahassee, FL ... 1372
Robert C. Vanderet, O'Melveny & Myers, Los Angeles, CA ... 1376
San Francisco Lawyers' Committee for Urban Affairs ... 1380
Additional questions for nominee from Senator Leahy ... 1381
Metzenbaum, Hon. Howard M.:
Article entitled "Failure of Anti-Discrimination," by Bernard Siegan, Orange County Register ... 1290
Siegan, Bernard H.:
Résumé ... 1151
Response to questions ... 1296

ALPHABETICAL LISTING OF NOMINEES FOR FEDERAL APPOINTMENTS

Beam, Hon. C. Arlen, to be U.S. circuit judge, Court of Appeals, Eighth Circuit ... 7
Conboy, Kenneth, to be U.S. district judge, Southern District of New York ... 900
Cummings, Samuel R., to be district judge, Northern District of Texas ... 514
Gawthrop, Hon. Robert S., III, to be district judge, Eastern District of Pennsylvania ... 661
Harrington, Edward F., to be U.S. district judge, District of Massachusetts ... 672, 889
Miller, Robert N., to be district judge, District of Colorado ... 418
Politan, Nicholas H., to be U.S. district judge, District of New Jersey ... 34
Rose, William S., Jr., to be Assistant Attorney General, Tax Division, Department of Justice ... 678
Siegan, Bernard H., to be U.S. circuit judge, Ninth Circuit ... 202, 1147
Trott, Stephen B., to be U.S. circuit judge, Ninth Circuit ... 472
Turner, Jerome, to be U.S. district judge, Western District of Tennessee ... 199
Van Antwerpen, Hon. Franklin S., to be U.S. district judge, Eastern District of Pennsylvania ... 196
Webb, Rodney S., to be U.S. district judge, District of North Dakota ... 39
Whipple, Hon. Dean, to be U.S. district judge, Western District of Missouri ... 667
Wolin, Hon. Alfred M., to be U.S. district judge, District of New Jersey ... 509

CONFIRMATION HEARING ON: C. ARLEN BEAM, NICHOLAS H. POLITAN, AND RODNEY S. WEBB

MONDAY, OCTOBER 26, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:07 a.m., in room SD-226, Dirksen Senate Office Building, the Hon. Howell Heflin (acting chairman) presiding.

Also present: Senator Thurmond.

Staff present: Steven J. Metalitz, chief nominations counsel; Andrew Rainer, investigative counsel; Robert J. Short, minority chief investigator.

Senator HEFLIN. The Judiciary Committee is holding its 13th hearing in this Congress to consider nominations to the Federal courts below the Supreme Court level.

Today we will take testimony on three nominations. The first is the nomination of Judge C. Arlen Beam, now a Federal district judge in Nebraska, to be a U.S. Circuit Judge for the Eighth Circuit. The other two nominations are to the district court: Nicholas H. Politan of New Jersey and Rodney S. Webb of North Dakota.

As we customarily do, we will hear first from the members of Congress who wish to introduce the nominees to the committee.

Let me note for the record that the Senators from New Jersey and North Dakota are not able to attend this hearing due to scheduling conflicts. We will include in the record introductory statements from any of these Senators.

I should also note that each nominee before the committee today has completed an extensive questionnaire on his qualifications, experience, and financial situation. The publicly available portions of these questionnaire responses will be printed in the record of this hearing.

We will also keep the record open for a limited time for follow-up questions to the nominee and for additional questions that may be submitted by members of the committee who are unable to be present this morning.

Senator Exon had planned to attend today's hearing but unfortunately will be unable to be here. He has asked that I give his statement, which I will do after we hear from Senator Karnes and Congresswoman Smith, who will introduce Judge Beam.

Senator Karnes and Mrs. Smith.

STATEMENT OF THE HON. DAVID R. KARNES, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator KARNES. Thank you, Mr. Chairman, distinguished members of the Judiciary Committee.

I take great pleasure in introducing this morning Judge Clarence Arlen Beam, President Reagan's nominee for the vacancy on the Eighth U.S. Circuit Court of Appeals.

I am extremely pleased that President Reagan nominated Judge Beam for this position. Not only has the judge demonstrated his outstanding judicial skills while serving on the Federal district court in Omaha, but he has also demonstrated through years of hard work and dedication to the legal profession that he is a man of exceptional talent and integrity with a solid understanding of the law.

In addition, Judge Beam brings to this appointment an unusually diversified background. While this committee has already spent time reviewing Judge Beam's record, I would like to point out certain aspects of his background that attest to his high degree of practical experience, acknowledged professional integrity, and most important, his well established judicial competence.

Arlen was born in the rural Nebraska community of Stapleton, population 340. He attended the University of Nebraska School of Agriculture, graduating with a degree in agricultural science.

Upon graduation he served our country as a captain in the U.S. Army in Korea during the Korean Conflict and continued thereafter for 11 years as an active member of the Army Reserve. Following his tour on active duty in Korea, Arlen Beam returned to Lincoln, Nebraska to begin his legal education.

He entered law school at the University of Nebraska in 1953. One year into law school, he felt it necessary to return to full-time work in order to support his family, thereby postponing the last 2 years of his legal studies.

For the next 9 years he drew upon his considerable interest in agriculture for employment, first as an agricultural journalist for the well-known publication, the Nebraska Farmer, then as a sales manager and advertising specialist for a major Midwestern seed company. He then founded his own public relations firm before returning to the University of Nebraska's law school to complete his final 2 years of law study in 1965.

Following his graduation from law school and for the next 18 years, he established himself in the private practice of law in Nebraska, becoming known during that time as one of the State's outstanding trial attorneys.

In 1982 Arlen was appointed to the Federal bench for the District of Nebraska, where he has served with great distinction.

Judge Beam's record of active participation in bar association, trial lawyer, and judicial conference events speaks clearly to his commitment to and understanding of the critically important rule of law in our ever-changing society.

He is a humble man who through great dedication, superior scholarship, and just plain hard work has earned the respect of his peers in the bar and colleagues on the Federal bench.

I would like to point out to this committee the extent to which Judge Beam is regarded by his peers in the legal community. In the last two polls taken by the Nebraska Bar Association, Judge Beam has received among the highest retention ratings in history for any Nebraska District Court judge. These high ratings by the members of the Nebraska Bar are an excellent reflection of the esteem in which Judge Beam is held in his current judicial district.

The Nebraska district court on which Judge Beam serves has one of the busiest trial dockets in the country. The court ranks fifth in the United States in terms of total filings of new cases per active judge and fifteenth out of approximately 100 districts in the United States in terms of weighted filings, or those filings which measure the difficulty of the cases considered.

There are only three active judges on this court, including Judge Beam, which is a very low number relative to the other district courts in the country. And yet this court on which Judge Beam is chief judge ranks first in the United States in terms of trials completed. Under Judge Beam the Nebraska district court has only eight-tenths of one percent of its cases that are 3 years or older, ranking this court as having the third most current docket in the United States.

And this, Mr. Chairman, has been accomplished despite the fact that this court was faced with 538 weighted filings per active judge. Four hundred such filings is sufficient grounds to appeal for a new Federal judge to be added to the court, but only three judges continued to sit on Judge Beam's bench.

Mr. Chairman, my purpose in detailing these aspects of the court and its heavy docket schedule and the difficulties that Judge Beam has had in managing this schedule—and I might say managing it very well—for these past 5 years speak well of the level of his competency and particularly the length of time that he takes to consider these cases and consider them very well.

He is clearly well qualified to serve on the eighth circuit appellate bench. While he is not alone on this court—the Nebraska district court—in achieving these accomplishments, Judge Beam is the chief judge and retains primary responsibility and is due much of the credit for not only the high quality of the work that he has performed but also for the orderly, on-schedule disposition of the court's caseload, factors that are so important in the face of our already-overburdened Federal appellate system.

He is eminently qualified to handle the significant responsibility of this new eighth circuit court position.

Mr. Chairman, bearing in mind the facts that I have just mentioned and Judge Beam's extensive, diversified record, I urge this committee to deliver this nomination to the Senate floor with a favorable recommendation as quickly as possible.

Mr. Chairman and members of the committee, I thank you for your very kind consideration of these comments, and I commend you for your efforts to ensure that the nomination process proceeds expeditiously for such a fine nominee as Clarence Arlen Beam. Thank you, Mr. Chairman.

Senator HEFLIN. Congresswoman Smith.

STATEMENT OF THE HON. VIRGINIA SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mrs. SMITH. Mr. Chairman, Senator Thurmond, and members of the committee, I thank you for this opportunity.

As the dean of the Nebraska delegation, I consider it a privilege and a pleasure to recommend the confirmation to your distinguished committee for Judge Arlen Beam of Nebraska for appointment to the Eighth Judicial Circuit Court of Appeals, which includes Nebraska, Iowa, Minnesota, Missouri, Arkansas, and North and South Dakota.

There is so much to say about Arlen Beam, I hardly know where to begin. I am proud that he was born and reared in Stapleton, Nebraska in my congressional district. He has been a journalist, a businessman, a captain in the Korean war, a lawyer, and a judge. He and his wife Betty have five sons, and we're all glad that Betty and four of their sons are here this morning.

And I want to tell you that Arlen was working full-time when he went to law school and at a time when they had this fine little family. He knows what hard work is.

But most importantly, let me point out that on the merits of the case—on the merits—he is the best possible candidate for this office. Moreover, he comes from Nebraska, and he assures that we will have a continued superb judge—resident judge—in Nebraska. That is of great importance.

The vacancy now occurring on the eighth circuit is created by the retirement of my good friend, Judge Donald R. Ross of Omaha. So this is a Nebraska vacancy by custom and tradition.

In fact, Nebraska has had a resident judge on the eighth circuit since 1933! Why is this significant?

Without a resident judge from Nebraska, the appeals court would be severely challenged to arrive at informed decisions with respect to much litigation originating in Nebraska, particularly cases arising from intensifying controversies over water rights and contamination of groundwater supplies. Unique to each State, too, are issues arising from redistricting and from emergency stays. Nebraska provides at least 7 percent of the circuit court's work.

So it is crucial that every State in a circuit be represented by a judge on the circuit court. At present, Missouri has three, Minnesota two, and Iowa, Arkansas, North Dakota, and South Dakota have one each. Judge Beam's appointment would restore a resident judge to Nebraska.

I remind the committee that for some years South Dakota, in this circuit, was without a resident judge. You may recall that the lawyers and judges of that State complained so much that my good friend and former colleague, the Hon. James Abdnor, felt obliged to call on President Reagan to rectify the problem—because he said he could not go home until the problem was solved.

Nativity, however desirable, is not as important as the qualifications of the candidate personally. Let us take a snapshot of Judge Beam, who has been a district judge in Nebraska since 1982:

He never has been reversed on any decision on a criminal case.

He never has been reversed on any decision relating to the admissibility of evidence.

He never has been reversed for errors in any instructions to a jury.

Furthermore, the House of Delegates of the American Bar Association earlier this year approved the 2½ years of work of Judge Beam as chairman of the Committee on Uniform Rules of Evidence of the Conference of Commissioners on Uniform States Laws.

Judge Beam has the unanimous support of the Republican leadership of Nebraska and a huge majority of the State's lawyers and judges for his appointment to this vacancy.

He brings to the Federal judiciary a wealth of life experiences from business and from the extremely successful practice of law. One of his most outstanding characteristics is his demonstrated judicial temperament. He is extremely productive. He is skilled in winning the cooperation of plaintiffs and defendants in reaching agreements.

He is accustomed to wielding power: he does so, however, not for personal aggrandizement but rather for bringing matters to an expeditious yet deliberate conclusion.

Lawyers agree that during his private practice he was a superb trial lawyer and that his judicial work consistently reflects his hard-won wealth of trial experience.

Beyond all this, Judge Beam is respected, almost revered in his home State among colleagues, members of the Nebraska bar, and the citizenry. The Federal judiciary is indeed fortunate to be able to attract a candidate of this caliber.

The Nebraska congressional delegation is deeply indebted to President Reagan, Senator Howard Baker, Attorney General Edwin Meese, and their respective staff assistants who were willing to listen to our arguments and who repeatedly made time so that we Nebraskans could make our case for Arlen Beam.

While I have not talked with every one of our Nebraska lawyers and judges, I think I heard a collective sigh of relief from back home when they learned that Judge Beam had been nominated for this appointment—assuring us again of having a superb resident judge.

There is no question among knowledgeable Nebraskans that Clarence Arlen Beam is the best candidate for this position. It is the correct appointment at the right time for all the right reasons.

I urge the committee to confirm his appointment to the eighth circuit court.

CLARENCE ARLEN BEAM

BACKGROUND

Born at Stapleton, Nebraska on January 14, 1930.

FAMILY STATUS

Married to Betty Lou (Fletcher) Beam; five sons, Randal, James, Thomas, Bradley, Gregory.

EDUCATION

Graduate Stapleton High School, 1947; B.S. Degree Agriculture Journalism, University of Nebraska-Lincoln, 1951; JD Degree, University of Nebraska-Lincoln College of Law, 1965; Federal Judicial Center Seminar on Experts, Statistics and Economics, University of Wisconsin College of Law, 1985.

PROFESSIONAL ACTIVITIES

Practicing Lawyer in Lincoln, Nebraska, 1965–1982; Omaha Bar Association; Nebraska State Bar Association; American Bar Association; Admitted to practice before United States Supreme Court, United States Court of Appeals for the Eighth Circuit, United States Tax Court, United States District Court, Supreme Court of the State of Nebraska; United States District Judge for the District of Nebraska, 1982 to date, Chief Judge 1986 to date; member, Judicial Council of the Eighth Circuit, 1985–1987; Nebraska Commissioner, Conference of Commissioners on Uniform State Laws, 1979 to date, Nebraska Chairman 1981, Chairman, Drafting Committee on Uniform Rules of Evidence, 1984 to date; Member, Nebraska Supreme Court Committee on Inquiry (discipline), 1975–1980.

OTHER EMPLOYMENT

Farm feature writer, The Nebraska Farmer Magazine, Lincoln, Nebraska, 1951; Served to Captain, United States Army (Korea), 1951–1953, USAR, 1953–1961; Sales, Advertising, Steckley Seed Company, Lincoln, Nebraska, 1954–1963.

COMMUNITY AND OTHER ORGANIZATIONS

Dundee Presbyterian Church, Omaha, Nebraska; Downtown Omaha Kiwanis Club; Post Number 3, American Legion, Lincoln, Nebraska; Newcomen Society of the United States; Former Member of the City of Lincoln, Nebraska, Charter Revision Commission.

Senator HEFLIN. Senator Exon asked that his statement be read.

Mr. Chairman, it is indeed a pleasure to be before the Senate Judiciary Committee to introduce Judge C. Arlen Beam.

The role of the judiciary in American life is at the forefront of the National debate. The celebration of the bicentennial of the Constitution and the focus on the Senate's constitutional role of advice and consent in filling court vacancies have provided the Nation and the Senate a good and a valuable history lesson.

Federal judges are appointed for life terms, and the Senate must exercise due care approving judicial nominations. I have been very supportive of all but a few of the president's 300-plus nominations.

In the case of Judge Arlen Beam, I happily and enthusiastically extend my complete support and unreserved endorsement. I have had the good fortune of knowing Arlen Beam for a number of years. He is a distinguished jurist and a respected lawyer.

Judge Beam has been a district judge in the State of Nebraska since 1982. As a judge, Arlen Beam is known for his calm manner, his common sense, and his even-handed administration of justice. He has been a leader in the judicial branch serving with distinction on a number of judicial councils and committees. Since 1986, Judge Beam has served as a chief judge of the Nebraska Federal District.

Recently I have worked closely with Judge Beam in my effort to secure an additional Federal district judge for the Nebraska District. A new judge is needed because Nebraska ranks fourth in the Nation and first in the eighth circuit in trials completed per judge. In this regard, Judge Beam is to be commended for his management of an extremely heavy docket.

Mr. Chairman, I think that one of the most interesting aspects of Judge Beam's career and his education is the fact that before attending law school at the University of Nebraska, Judge Beam graduated with a bachelor of science degree in agriculture and that after graduating from college and prior to completing law school, Judge Beam worked in agribusiness and journalism. I am unaware of any other Federal judge with a similar background.

Judge Beam's knowledge of agriculture and rural living certainly gives him some very important insights. I am certain that this sensitivity towards the people of America's heartland who are served by the Eighth Circuit Court of Appeals will be a most valuable asset.

As an attorney, Arlen Beam was known as a skilled professional and true gentleman. His practice covered a broad range of legal matters. Even in the pursuit of a legal career, Arlen Beam found time to be a member of public service organizations.

Mr. Chairman, I think that you will find Judge Beam to be an interesting witness and the right man for the job of circuit court judge. I appreciate the opportunity to introduce my friend and express my support for his nomination.

I look forward to the recommendations of the Senate Judiciary Committee and will be available to assist in any way with the confirmation of Judge Beam.

Thank you, Mr. Chairman.

Are there any other Senators or Congressmen that are here with another judge?

We have statements that would be introduced into the evidence.

Congresswoman Smith and Senator Karnes, if you'd like to stay, we'd be delighted.

Senator THURMOND. Let me say just a word before——

Senator HEFLIN. Yes, sir.

Senator THURMOND. I just want to express my appreciation to Congresswoman Smith for coming over in person and testifying on this nomination.

She is an outstanding member of Congress. She is a senior member—the dean, I believe—of the Nebraska delegation, and we are very proud of her.

Senator Karnes, I want to congratulate you for submitting this name to the president.

You have made an outstanding record here in the Senate. We are very proud of you and what you have done.

Judge Beam, you are to be commended for having the strong support of a good man like Senator Karnes. And I am very pleased also that you have Senator Exon's support, who is also a very influential member of the Senate.

Senator HEFLIN. Judge Beam, if you will come forward and raise your right hand and take the oath.

I forgot to swear you.

Do you solemnly swear that the testimony before this committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge BEAM. I do so swear, Mr. Chairman.

Senator HEFLIN. Judge Beam, would you like to introduce members of your family that might be with you?

TESTIMONY OF THE HON. C. ARLEN BEAM, OMAHA, NE

Judge BEAM. Yes, I would, Mr. Chairman.

With me this morning is my spouse, Betty; my oldest son, Randal, from Eugene, OR; my next oldest son, James, and his spouse Marcia, from Rockford, IL; my son, Brad, from Omaha; and, my son, Greg, from Lincoln. Absent are my middle son, Tom, and his wife, Debbie, who are the parents of our two grandchildren. They couldn't make the trip with us today. I would also like to introduce my mother-in-law and father-in-law, Mr. and Mrs. Albert Dreier from Lincoln.

Mr. Chairman, if it would be appropriate, I would like to acknowledge the presence of Mr. Tom Robinson, who is associate solicitor for the Department of the Interior. His father, Senior U.S. District Judge Richard Robinson, is my mentor and associate on the trial bench in Omaha. One of my law clerks, Mr. Mitchell Bernay, is also here today.

Senator HEFLIN. Well, we're delighted to see that your family and your friends are here with you today.

These hearings are to establish a record. I don't think there is substantial opposition to your confirmation. However, there are questions that should be asked and put into the record, and so

some may not sound as pleasant as you might wish. But nevertheless, I think that they have to be asked, and they have been prepared by persons other than myself.

In June of this year the American Bar Association's journal published an analysis of the affirmance and the reversal rates of the Federal district judges from around the country. The analysis gave you one of the lower ratings around the country, saying that in 1986 you were reversed in seven of eleven civil cases that the eighth circuit acted on that year.

How would you account for that low rating? Was the eighth circuit unduly rough on you?

Judge BEAM. I think that rating, Mr. Chairman, involved itself with only some of the cases that I dealt with. It did not, of course, deal with the unpublished opinions. And frequently, district judges, when they have done an unusually good job, in the eighth circuit, are affirmed pursuant to Rule 14, and the matters are not published.

I think I would also point out, Mr. Chairman, that the article dealt only with appeals for the year 1986, which cases would have, essentially, been for trial in 1985. It didn't take into account the other years. I have now been on the bench almost 6 years. In the first 5 years, I believe that I probably entered something in excess of 3,000 appealable orders. There are no hard figures so I'm dealing with estimates.

Of the some 3,000-plus appealable orders that I entered in the first 5 years, approximately 250 of them—or less than ten percent—were appealed to the circuit court. And to the best of my knowledge, in that whole period of time, I have had a total of 22 or 23 reversals.

That would be one percent—if my estimates are correct—actually less than one percent—of all of the appealable orders that I have handled and it would be only 8 to 9 percent of the cases that were appealed.

Now, by way of comparison, in 7 Hamline Law Review, Judge Gerald Heaney of the eighth circuit wrote an article dealing with the high number of social security reversals in the eighth circuit. In that article he indicated that the average reversal rate for appeals to the eighth circuit runs from 16 to 19 percent. I'm not sure of the source of his figures but I'm assuming that they are reasonably accurate.

Based upon his assertions, it would appear that my reversal rate is something less than half of the average for the eighth circuit trial judges. So, I think the Bar Journal article was, at best, somewhat misleading.

Senator HEFLIN. In your response to the committee questionnaire you listed some 20-odd cases in which you had been reversed. In four of those cases the circuit court found that you had made clearly erroneous findings of fact. In another three cases the circuit court reversed you for affirming decisions of the Social Security Administration that it found were not supported by the evidence.

Do you think that the circuit court engaged in too much appellate fact-finding in these cases? As a circuit judge, would you be more deferential to trial-level findings of fact as you were in the three social security cases that I mentioned?

Judge BEAM. Mr. Chairman, I'm a firm believer in Rule 52 of the Federal Rules of Civil Procedure.

Without attempting to evaluate the work of the eighth circuit, I would only say that a trial judge is present at the trial; he is there for the pretrial matters; he sees the witnesses testify; he observes their demeanor. And I believe I will attempt to give great deference to such things as an appellate judge.

Senator HEFLIN. The committee has received some complaints concerning your handling of civil rights cases on the district court.

Let me ask you about one of these cases—*Griffin* v. *City of Omaha.* In that case, you found that there had been no discrimination between two black female police recruits that had been discharged from the police force for failing to qualify for firearm usage. The eighth circuit reversed on the grounds that you had overlooked several important pieces of evidence.

On remand you wrote a memorandum that could be described as somewhat defiant. You wrote,

> There appears to be little point in this court engaging in a debate with itself over evidence which it believes that it carefully and properly considered in the first instance.

Do you feel that a district court judge—do you feel that as a district court judge, you were properly responsive to the ruling of the court of appeals in this case?

Judge BEAM. I think that I was, Mr. Chairman. And I did not intend for my tone to be defensive.

The circuit court dealt with some specific items of evidence. And in re-reviewing the record, I found that there were more aspects of the facts than had been mentioned in the circuit opinion.

I would also point out, Mr. Chairman, that upon remand I did follow what I thought to be the mandate of the circuit court. I entered an order for the one defendant and found liability against the city for the other.

And as we proceeded to do the fact-finding on the issue of damages, the parties got together, arrived at an amount that they could agree upon, both in terms of damages and attorney fees, and presented me with a stipulated order. I entered the order.

I believe that my ultimate and interim responses were in accordance with the circuit court opinion.

Senator HEFLIN. Judge Beam, I understand that your wife was a member of the Nebraska Equal Opportunities Commission until about the time you became a district judge in January of 1982.

About 1½ years later—September 1983—in the case of *Simmons* v. *Omaha Girls' Club,* you had occasion to rule on the immunity from suit to be accorded to the members of that commission. That case did not involve a matter that was handled by the commission at the time your wife was a member, and obviously she was no longer a member at the time you ruled in the case.

However, the effect of your ruling was to protect your wife from suit in cases in which she was involved. Did you give any thought to the ethical issue that this posed?

Judge BEAM. Mr. Chairman, my wife—I did not enter an order that dismissed the commission from the suit.

That suit was originally filed in Lincoln. It was originally handled by Judge Warren Urbom.

Judge Urbom, at the request of plaintiff's counsel, well into the matter, recused himself. The case was transferred to Omaha to my associate, Judge Albert Schatz.

Judge Schatz became ill. It is my recollection that after his illness and death, the case was assigned to me.

The governor of Nebraska and the Nebraska Equal Opportunity Commission had been dismissed from the case by Judge Urbom before it became a case that was on my docket.

I have very carefully attempted to evaluate each civil rights case that has come before me as a district judge to ascertain that no matter which was considered during my wife's term on the Nebraska Equal Opportunity Commission would be tried in my court.

As a matter of fact, I once got halfway through a case and discovered that there has been some involvement. I declared a mistrial, stepped out, and transferred the case to another judge.

I have tried to give close scrutiny to every case dealing with ethical considerations.

Senator HEFLIN. I believe that you asked your wife to resign too from the commission.

Judge BEAM. My wife and I discussed, Mr. Chairman, her continued service on the Nebraska Equal Opportunity Commission. She was an excellent commissioner, and it was work that she enjoyed.

We further jointly discussed the matter with Senior U.S. District Judge Robert Van Pelt. He is on the Committee of the Judiciary headed by Judge Markey that passes upon matters of ethics. Judge Van Pelt said that it was essentially up to my wife.

We had further discussions. She then decided to resign, sir.

Senator HEFLIN. Some court of appeals judges have extensive experience in the trial court, as you do. Others do not bring extensive trial experience with them to the appellate bench.

How important do you think trial and court experience is to success on the appellate court? How would your experience on the trial court help you to prepare you for service on the court of appeals?

Judge BEAM. Well, I certainly know very capable appellate judges who have not had trial experience. I also know a number of very capable appellate judges with trial experience.

I think the benefits that a trial judge would bring to the appellate bench would be experience with the rules of procedure, experience in judging the elements of the fact-finding process as well as many other attributes that are necessary for an appellate judge. That includes legal research and writing.

I think that my experience as a U.S. district judge should be very helpful to me if I am confirmed by the Senate.

Senator HEFLIN. When the new Federal sentencing guidelines go into effect, the court of appeals will face a new challenge—appellate review of criminal sentences. Traditionally, sentencing has been left to the discretion of the trial judge with little guidance from the appellate courts. But in the future, review of sentences will become a significant part of the appellate court docket.

How would you prepare to discharge this new appellate court responsibility?

Judge BEAM. I'm going to take advantage of the training program that the Federal Judicial Center has established for trial judges dealing with the new sentencing guidelines.

I also intend to study the law carefully, and I have attempted to keep up with the arguments that have been made with regard to the new sentencing guidelines and the rules and regulations that have been promulgated.

I think that by understanding how they will be handled at the trial court level and watching the guidelines in use, I will be helped as an appellate judge in taking care of the responsibilities that I will have in that regard, Mr. Chairman.

Senator HEFLIN. Senator Thurmond, did you have some questions?

Senator THURMOND. Thank you, Mr. Chairman.

Judge, we're glad to have you with us.

Judge BEAM. Thank you, sir.

Senator THURMOND. We have something in common. I graduated in agriculture first too.

Judge BEAM. I am pleased to know that, sir.

Senator THURMOND. And I think it's a great experience to understand the farming situation in this country.

If the entire population was as law-abiding as the farmers, we wouldn't have all the crime in the country we have today, either.

Judge, we hear a lot today about judicial activism—that is, judges going beyond interpreting the law. Some judges feel that if Congress hasn't done what they should have done that they ought to step in and make the policy.

My opinion is that the judiciary ought to stick to interpreting the law and the Constitution and that if Congress fails to do its duty, it's no excuse for a judge to come in and supplement or to do what they think the Congress ought to do.

How do you feel about that?

Judge BEAM. I think that judges should not step in and attempt to do what they think Congress should do, Senator Thurmond.

Senator THURMOND. It is my feeling that State institutions should be left to the State to run—State prisons, State schools, State hospitals.

In some instances, the judges have come in and taken charge of them. And in a case I read about a few days ago, they actually imposed a tax to do something the judge wanted done.

Well, if the local people didn't want that done, if the people in the State didn't want that done, why should a Federal judge use his vast powers to do such as that?

It seems to me that judicial activism can really become very offensive, and I am anxious to know how the judges feel that go on the bench about that.

Judge BEAM. Senator Thurmond, I think the case to which you refer is a case from Kansas City, Missouri. And it is a case that may possibly reach the U.S. Court of Appeals for the Eighth Circuit.

If I am fortunate enough to be——

Senator THURMOND. If you prefer not to address that, since it may come before your court that is fine.

Judge BEAM. I think I would prefer not to.

Senator THURMOND. I wouldn't ask you to do that.

Judge BEAM. Thank you, sir.

Senator THURMOND. Another thing too is judicial temperament.

Not very many—but I have seen a few Federal judges flaunt their power. I have seen them embarrass lawyers, embarrass jurors, and embarrass other people around the court.

A Federal judge has more power than any one individual I know. And I have always gone on the theory that the more power a person has, the more humble he ought to be.

What's your feeling about judicial temperament?

Judge BEAM. I think one of the more important attributes of someone who aspires to be a judge is judicial temperament.

I spent quite a number of years on the other side of the bench, Senator Thurmond, and I know how important it is to your own self esteem as well as to your image with your client not to be embarrassed by someone presiding. So that's something I try to keep in mind every day. I try to be as courteous as possible commensurate with control of the courtroom.

So I think that judicial temperament is indeed important.

Senator THURMOND. I think it's nice for a judge to want to have his opinions confirmed by a higher court if necessary. On the other hand, I look upon a judge as a person—because he has all of the facts and knows all of the details—as one who ought to make up his own mind, keeping in mind of course stare decisis—the previous decisions decided.

In other words, a person goes into court for one purpose, and that is to get justice. That's the only reason you have a courthouse. That's the only reason you have a Federal judge—is to get justice.

And it seems to me that a judge has got to use his honest opinion as to what is right and wrong and what will mete out justice, regardless of what he thinks a superior court will do.

How do you feel about that?

Judge BEAM. I agree, Senator.

Senator THURMOND. I have no other questions, Mr. Chairman.

Senator HEFLIN. Thank you, Senator.

Senator THURMOND. Oh, I do have one question.

I believe you belong to the Masons, don't you?

Judge BEAM. Yes, sir, I do.

Senator THURMOND. We had some trouble here some time ago with one nominee who belonged to the Masons, and he was held up here for months and months—the most ridiculous thing I ever heard of.

I am a Mason; I am proud of it. Five members of the Judiciary Committee are Masons. A lot of members of the Senate are Masons.

I don't think we will have that trouble anymore, though.

Senator HEFLIN. I concur with what you say, Senator Thurmond.

Thank you, sir. We appreciate it.

There may be written questions that may be propounded to you. If you would answer those and get them back to us as quickly as possible, it would be appreciated.

[Written questions to Judge Beam follow:]

QUESTION REGARDING ORGANIZATIONAL MEMBERSHIPS

Question: Have you satisfied yourself that the all-male organizations to which you belong do not invidiously discriminate against women, and that therefore it is appropriate for you to maintain your membership? If so please explain the basis for your conclusion that these organizations do not invidiously discriminate.

Answer: Yes. The Masonic Lodge is a fraternal organization with a long history of support of and concern for the spouses and children of members. Additionally, there are a number of affiliated organizations which encourage the membership of women.

In 1981, prior to commencing my work as a United States District Judge, I gave careful consideration to the continuation of my masonic membership. And, after consultation with a number of trusted individuals, both masons and non-masons, I concluded that it was proper to continue my affiliation. To the best of my knowledge, numerous other state and federal court judges have apparently reached the same conclusion because they have continued to be members of masonic organizations.

October 26, 1987

C. Arlen Beam
United States District Judge
District of Nebraska

ADDITIONAL QUESTIONS FOR JUDGE C. ARLEN BEAM

QUESTION 1: In addressing the question posed to you about your ruling on immunity for members of the Nebraska Equal Opportunity Commission, you appeared to be discussing the case of Chambers v. Omaha Girls Club, in which you did not rule on the immunity question. However, you did render a ruling on that question in the case of Simmons v. Omaha Girls Club, a copy of which is attached. Again, the ruling seems to postdate your wife's membership on that Commission, but presumably might have had precedential effect on cases in which she was involved. How did you assess the ethical issues posed in this situation?

ANSWER: I responded to the Committee inquiry in the belief that the question related to Chambers v. Omaha Girls Club. Pamela Simmons et al v. Omaha Girls Club et al was originally assigned to my docket but was transferred to the docket of U.S. District Judge John B. Jones of Sioux Falls, South Dakota, on March 19, 1985. According to the records of the Clerk of the Court, the matter was dismissed by Judge Jones upon joint stipulation of the parties on May 21, 1985. At the hearing this morning, I simply forgot that I had made some rulings in the case.

I have carefully attempted to avoid the consideration of any actions which were at any time considered by the Nebraska Equal Opportunity Commission while my wife was a member of the body. To the best of my belief, I have been successful in doing so. It is my best recollection that early in my term as a District Judge, I visited with the other Omaha judges of the District about this matter because it meant that case reassignments would be necessary. It is my belief that we jointly felt that this would be a proper way to approach the problem.

My wife submitted her resignation in December of 1981. The resignation was accepted by the Governor of Nebraska on January 15, 1982. The alleged adverse employment action against Ms. Simmons occurred on July 21, 1982 and the Nebraska Equal Opportunity Commission investigation began on or about August 3, 1982. This was well after my wife had resigned from the Commission.

My order found "immunity from liability in damages for the conduct charged" by the plaintiffs in the action at hand. It did not occur to me that this could have precedential effect on other cases arising out of actions taken by the Nebraska Equal Opportunity Commission while my spouse was a commissioner. To my knowledge it has never been used as precedent in any case in any way related to my spouse. And, the statute of limitations has now expired on any such matters. While my order was the law of the Simmons case, I do not believe that any other judge was in any way bound to follow my conclusions in other cases.

QUESTION 2: Would you please provide to the Committee a list and a short summary of those employment discrimination and civil rights cases that you have handled in the District Court in which you ruled for the plaintiffs?

ANSWER: To the best of my recollection, I have presided over approximately twenty-one employment discrimination and civil rights trials to date. Eight of the cases resulted in a judgement for the plaintiff. Three of the cases decided for the plaintiff were jury cases. Five of the cases decided for the defendant were jury verdicts. The cases in which the plaintiff prevailed were as follows:

(1) Jorgensen v. Modern Woodmen Insurance, Cv.80-0-345. This was an age discrimination case in which I ruled for the plaintiff. The U.S. Court of Appeals for the Eighth Circuit reversed my decision.

(2) Coleman v. The City of Omaha, Cv.81-0-168. The plaintiff was a Deputy Chief of Police who alleged age discrimination. The jury held for the defendant on the issue of back pay. I disagreed with the jury and held for the plaintiff on the Title VII issues submitted to the Court. The City appealed and my decision was affirmed by the Eighth Circuit.

(3) Corso v. Creighton, Cv.82-0-477. In this action the plaintiff was dismissed from medical school and alleged due process and contract violation. I held for the plaintiff and was affirmed by the Eighth Circuit.

(4) Newton v. City of Omaha, Cv.83-0-211. In this action the plaintiff claimed 42 U.S.C. 1983, RICO and state law violations. A jury found for the plaintiff. The case was not appealed.

(5) Nicholson v. The City of Bellevue, Cv.83-0-325. The plaintiff alleged racial discrimination in employment and various other causes of action. The jury awarded the plaintiff a substantial verdict. The judgment was not appealed.

(6) Hammond v. The City of Omaha, Cv.83-0-501. Plaintiff alleged that he was beaten by members of the Omaha police force after his arrest. The jury awarded a verdict. The judgment was not appealed.

(7) Tyler v. Vitek, Cv.85-0-799. The plaintiff alleged first amendment violations while incarcerated in a local jail facility. I found for the plaintiff and awarded his damages.

(8) Farrakhan v. Gumbert Executive Exchange, Cv.80-0-62&63. The plaintiff alleged that his applications for work were not properly referred to potential employers for racial reasons. I held for the plaintiff. Prior to appeal the parties reached a settlement.

October 26, 1987

C. Arlen Beam

C.Arlen Beam
United States District Judge
District of Nebraska

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA
FEDERAL COURTHOUSE
215 NORTH 17TH STREET
P. O. BOX 1297 DTS
OMAHA, NEBRASKA 68101

C. ARLEN BEAM
CHIEF JUDGE

November 5, 1987

EXPRESS MAIL

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
212 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Hearing, United States Senate Committee on the Judiciary

Dear Senator Biden:

Shortly after my hearing on October 26, 1987, I received three written follow-up questions from the Committee. I responded to them on that date while still in Washington, D.C. I did not have the benefit of case files in preparing the answers. They would have been helpful.

Mr. Andrew Rainer has made a request by telephone for some additional information. I appreciate the opportunity to complete the record.

In my response with regard to the case captioned Simmons v. The Omaha Girls Club, et al., I pointed out that the action was transferred to the docket of United States District Judge John B. Jones of Sioux Falls, South Dakota. This answer was, indeed, somewhat confusing since it appears to indicate that the case was transferred out of the District of Nebraska. This did not occur.

Because our caseload per judge is very heavy in this district, we have sought help from other judges in the Eighth Circuit as their schedules will permit. As a result, Chief Judge Donald P. Lay of the Eighth Circuit has assigned Judge Jones to preside over cases in Nebraska on at least two occasions. Judge Jones was assigned to Nebraska for a period of time extending from May 1, 1985, to December 31, 1985. See copy of attached designation order. He was assigned several cases from each of the Omaha dockets. Simmons v. The Omaha Girls Club, et al. was a non-jury case from my docket which was to be ready for trial by April of 1985. It was, thus, assigned to Judge Jones. See copy of attached Clerk's reassignment order.

The case captioned Chambers v. The Omaha Girls Club, et al., was originally filed by the plaintiff in Lincoln, Nebraska. It was assigned to then Chief United States District Judge Warren K. Urbom, the resident judge at that location. He supervised the file from January 24, 1983, until December 31, 1984, at which time Chief Judge Urbom reassigned the case to the docket of the late United States District Judge Albert G. Schatz. Judge Urbom had recently recused himself from the case upon the motion of plaintiff. On March 14, 1985, the Clerk of the Court reassigned the case to my docket. I do not specifically recall the reason for the reassignment. Judge Schatz, had, however, become seriously ill at or about that time and died in April of 1985. In any event, I completed the District Court work on the case. It is presently on appeal to the Eighth Circuit.

In my answer to the Committee inquiry with regard to cases in which a plaintiff has prevailed, I listed Nicholson v. The City of Bellevue, et al. This was a jury case in which the jury returned a verdict for the plaintiff. Without the benefit of the file, it was my recollection that the case was ultimately concluded by the parties without an appeal. This was an accurate recollection. A review of the file reveals, however, that an en banc opinion of the Eighth Circuit Court of Appeals in Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985), released six days after the verdict, resulted in an order for a new trial. Subsequent to the entry of that ruling, the file indicates that a settlement was reached by the parties and the action was dismissed at their request. See copies attached of order for new trial and for dismissal.

I trust that this responds to the inquiries made. I appreciate the opportunity to extend the record. Thank you for your courtesies and those of your staff.

Yours very truly,

C. Arlen Beam
Chief Judge

Enclosures

AO 25B (Rev. 6/83) ⊕

DESIGNATION OF DISTRICT JUDGE
FOR SERVICE IN ANOTHER DISTRICT WITHIN HIS CIRCUIT

FILED
DISTRICT OF NEBRASKA
AT _____ M
MAR 2 5 1985
William L. Olson, Clerk
By _____ Deputy

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the provisions of Title 28, United States Code, Section 292(b), I do hereby designate and assign the Honorable

JOHN B. JONES

United States District Judge for the _____ District of South Dakota

to hold a district court in the _____ District of Nebraska during

the period beginning May 1, 1985, and ending December 31

1985, and for such additional time in advance thereof to prepare for the trial of cases, or thereafter as may be required to complete unfinished business.

Donald P. Lay
Chief Judge

Dated March 20, 1985 Eighth Circuit

cc: Chief Judge Bogue
Chief Judge Urbom
Judge Schatz

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

FILED
DISTRICT OF NEBRASKA
AT ____ M
MAR 19 1985
William L. Olson, Clerk
By ____ Deputy

ımela Simmons

Plaintiff,

vs.

ıe Girls Club of Omaha, Inc., et al.

Defendant.

REASSIGNMENT ORDER

Cv. 83-0-295

IT IS ORDERED that the above entitled case presently assigned to Judge Beam is hereby reassigned to Judge Jones for disposition.

FOR THE COURT:

WILLIAM L. OLSON
Clerk of the Court

By _____
Deputy Clerk

November 2, 1987

MARY KAY GREEN
ATTORNEY AT LAW
5017 Underwood #4
Omaha, Nebraska 68132
1-402-553-6161

Senator Patrick J. Leahy
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Attention: Andrew Rainer, Counsel

Dear Senator Leahy,

I am asking that this letter and the attached documents be made a part of the hearing on the nomination of Judge C. Arlen Beam for the Eighth Circuit Court of Appeals.

I received a copy of the answers of Judge Beam submitted to the Judiciary Committee. As pointed out by Judge Beam in his Answers only two of the cases he cited of eight civil rights cases where the plaintiff prevailed were race discrimination cases.

The damages awarded in the last case, the Farrakhan (see #8 Answers, Judge Beam) were nominal.

In the case of Nicholson v. The City of Bellevue, CV. 83-0-325, Judge Beam's statement to the Committee was misleading and false due to his omissions of fact. (See #5, Judge Beam's Answer).

Judge Beam Stated to the Committee:

> "The plaintiff alleged racial discrimination in employment and various other causes of action. The jury awarded the plaintiff a substantial verdict. The judgment was not appealed."

Now as Paul Harvey would say, here's the rest of the story. Judge Beam set aside the $270,000.00 jury verdict and granted the Defendants a new trial (See copy of Judge Beam's order attached). The case was not set for new trial immediately because that was during the period when there was no money to operate the federal courts during the federal budget debate in 1986. The Defendants made a post trial settlement offer that was one third of the jury verdict. Because of the prospect of being tied up an additional two years in court without income, the Plaintiff was forced to take the settlement.

The case was not appealed because it was settled. But it was not the judgment that would have been appealed, the appeal would have been of the order to set aside the judgment.

Another footnote to the Nicholson case is that that jury verdict was the second highest civil rights jury verdict in the state of Nebraska. The first jury verdict some years back was that in the caseof JoAnn Yellow Bird. The federal jury awarded her $300,000.00. She was an American Indian who was beaten and kicked by a sheriff or deputy sheriff in Gordon, Nebraska. As a result of the beating, Ms. Yellow Bird lost the infant she was expecting. That was and is the record civil rights jury verdict in the federal and state courts of Nebraska.

Because Nicholson was the second highest civil rights jury verdict, it received considerable press coverage at the time. I am enclosing a copy of the clippings from the Bellevue paper. Bellevue is a "suburb" of Omaha, and it is the home of the S.A.C. Headquarters. The case was also reported in the Omaha World Herald.

In another case before Judge Beam, that of Crystal Chambers v. The Omaha Girls Club, 83-L-38, 629 F. Supp.925 (1986), Judge Beam had several relationship to the case that raised the appearance of a conflict of interest and possible direct conflicts of interest. I have outlined these matters in separate correspondence and ask that that correspondence and the accompanying documents be likewise submitted to the committee.

In addition the conduct of the Chambers case by the Judge raises the gravest of concerns. Not knowing Judge Beam, and not having lived and worked in the same city that he lived his professional and political life, I was not award of Judge Beam's numerous associations that touched on this case. But I was aware from the begining that while the State had been dismissed as a defendant as well as the state officials, the state still had a representative in the form of the Judge. The Judge was not a neutral force directing the proceedings.

The Friday before the trial was to commence, I was called by the Judge's law clerk Wendy Hahn and told that the Judge had ordered me to appear in his chambers Monday morning with the publisher and vice president of the Omaha World Herald and their wives so he could determine if I was going to be allowed to call them as witnesses.

When I informed the law clerk that I would file a motion for an open hearing in open court and that I would not produce the defendants and their spouses for a private hearing in the Judge's chambers, she called back to inform me that the Judge would subpoena the World Herald officials and their wives and that the hearing would be held in open court.

This unusual procedure was repeated on most days of the trial. We were called into the Judge's chambers before trial each day to discuss whether the Judge would allow certain testimony. In my ten years of practice, I have never been subjected to this kind of procedure. I come from a legal family. My father the late James F. Green was an attorney and four of my eight siblings are attorneys.

I have never heard of trial-in-chambers as was conducted in the Girls Club Case.

Going back to the private hearing for the World Herald officials. While it is true that the officials were called to open court. All procedings were actually held in chambers where the Judge determined that we would be allowed to call the Defendant wife of the publisher since she was a member of the Girls Club board and named as an individual defendant, and we would be able to call the World Herald vice president's wife because she was an NEOC Commissioner on the case, but we would not be allowed to call any official of the paper or any employee, although we would be able to produce as exhibits the stories and editorials written by the paper during the administrative NEOC proceedings. Those exhibits were never shown to the jury, and the Judge dismissed the jury inspite of evidence of racial discrimination.

The trial was like a roller coaster ride. We did not know from one day to the next whether the Judge would be temperate or intemperate in his conduct. We could not understand the energy he had in this case. None of it was clear until we received information from two outside sources, one a Commissioner who had served with Judge Beam's wife on the NEOC and one a court observer who had researched Judge Beam's background and found that he was a friend, political advisor and paid attorney for the Governor whose appointees and commission were being challenged.

As you can see from the Lincoln Journal and World Herald clippings sent to you, Judge Beam was not only a friend and political advisor, he had been part of Governor Thone's administration as his apparently-paid transition chief helping the Governor set up his Government including the Commissions. One of those appointments made by the Governor was of the Judge's wife. After the government was set up, Judge Beam went back into private practice and served as paid by the state of Nebraska as Governor Charles Thone's attorney in state matters.

Judge Beam in his Order, which I have submitted to you, stated that his wife's term of office ended before the Chambers case. Mrs. Beam's vacancy was filled nine days before the illegal ex parte hearing before the NEOC on Crystal Chambers case. Mrs. Beam was replaced by the wife of the vice president of the Omaha World Herald.

Judge Beam further stated that Charles Thone had not used him before the NEOC. Judge Beam was Charles Thone's alter ego. The energy he demonstrated in defense of Charles Thone's administration in the Girls Club case was that of a good friend loyally defending the administration of his friend. It was not the energy of a dispassionate trier of fact. Let's be frank, could Edwin Meese if appointed Judge be a dispassionate trier of fact in a case challenging the authority of President Reagan, could Kenney O'Donnell have been dispassionate about John Kennedy.

And finally would Judge Beam have been a good spouse had he not defended the Commissioners who had served with his wife those many years or if he hadn't granted absolute immunity to all of them (Simmons) including Mrs. Beam.

We were able to learn the third link to the Thone administration triangle. Charles Thone was not only a political friend of the publisher of the Omaha World Herald Herald Andersen, they had lived together as young men when both were students at the University of Nebraska. Thus we can only assume that Judge Beam as close as he was to Charles Thone both personally and politically had to know that Harold Andersen and Charles Thone were equally close.

Right before trial Judge Beam dismissed the Omaha World Herald defendants and newspaper from the case on a Motion for Summary Judgment.

Crystal Chambers was a young black woman who without money or an attorney filed an EEOC and NEOC complaint of discrimination when she was wrongfully fired from her job as an arts and craft teacher at the Omaha Girls Club in 1983 because she was single and pregnant. Little did she know that that one act of moral courage would bring out such concerted action by the wealthiest people in the state resulting in a major civil rights conspiracy trial challenging their "back door" efforts to influence the NEOC.

Crystal Chambers was entitled to an impartial trier of fact, and she was entitled to full disclosure before her trial.

The question the committee should ask Judge Beam is why did you reassign the Simmons case and why did you remain in the Chambers case when you had so made personal connections to the case which would evoke your conscious and unconscious loyalties.

During the discovery in the Girls Club case I asked the publisher of the Omaha World Herald if Richard Nixon's case had gone to a civil trial, did he think Mr. Nixon would have had a fair trial if the spouse of the publisher and/or editor of the Washington Post had been on that jury. Mr. Andersen replied that Mr. Nixon would have had preemptory challenges. I then asked him what if he/she had not revealed the spouse's identity and association with the paper as was the case with Mrs. Gottschalk an NEOC commissioner. Mr. Andersen was silent.

The same principle of disclosure and fairness applies to the bench if the right to a fair trial is to be preserved.

Your committee should address these issues before referring Judge Beam's nomination, and I respectfully so request.

Sincerely,

Mary Kay Green

MARY KAY GREEN

sa/mkg
enc:

N THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAVID NICHOLSON,

Plaintiff,

vs.

CITY OF BELLEVUE, NEBRASKA, et al.,

Defendants.

CV 83-0-325

FILED
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA
AT ORDER
APR 22 1986
William L. Gibson, Clerk

This matter is before the Court upon the defendants' motion (filing 133) for new trial and motion (filing 131) for a judgment notwithstanding the verdict. The parties submitted briefs on the issues and presented oral argument. The Court, after reviewing the issues, finds that the motion for new trial should be granted.

A motion for new trial should be granted if an error of law results in gross injustice. C. Wright and A. Miller, Federal Practice and Procedure, Civil § 2805 (1973). The jury at the time of trial was instructed that the plaintiff could recover under 42 U.S.C. §§ 1981 and 1983, if the jury found that discrimination was a "discernible factor in the defendants' decision to take the adverse employment action." (Filing 121, Instruction 8). The jury was instructed that merely upon a finding that race played a "discernible factor" damages could be assessed, that included back pay. (Filing 121, Instructions 11 and 14). The jury, in fact, awarded the plaintiff compensatory damages which may be comprised to some extent of back pay.

The Court relied on Bibbs v. Block 749 F.2d 508 (8th Cir. 1984) in drafting the discernible factor jury instructions presented to the jury on December 5, 1985. However, after

rehearing en banc, the Eighth Circuit held that an award of back pay comes "only after a finding that discrimination was the but-for cause of the employment decision." (emphasis added). Bibbs v. Block, 778 F.2d 1318, 1322 (8th Cir. December 11, 1985).

The jury was not instructed that before an award of back pay may be made that they must first find that discrimination was the but-for cause of the employment decision. Defendants offered evidence at time of trial that any employee who revealed bids, quotes or estimates and who solicited kick-backs would be suspended pending an investigation. By instructing as it did, the Court prevented the jury from considering that evidence. This may have resulted in the plaintiff being awarded damages that made him more than whole. Bibbs, 778 F.2d at 1322. The plaintiff may have been awarded money that he would never have recieved, regardless of any racial discrimination. Id.

In addition, an award of back pay absent a showing that race was the but-for cause of the employment decision is contrary to the Supreme Court's decision in the case of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), wherein the Court stated that the object is not to place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. Id. at 285.

By failing to instruct that discrimination had to have been the but-for cause of the employment decision before back pay could be awarded, this Court committed plain error in view of Bibbs and Mt. Healthy.[1] The Court finds the error must be corrected by sustaining defendants' motion for new trial.

Accordingly,

IT IS ORDERED as follows:

1. The defendants' motion (filing 133) for a new trial should be and hereby is granted.

2. The jury verdict (filing 127) should be and hereby is set aside.

3. The plaintiff's motion (filing 128) for order to commence interest should be and hereby is denied as moot.

4. The defendants' motion (filing 131) for judgment notwithstanding the verdict should be and hereby is denied.

5. The plaintiff's motion (filing 136) for attorney fees should be and hereby is denied as moot.

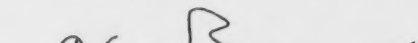
6. The defendants' motion (filing 139) for post-trial discovery and evidentiary hearing should be and hereby is denied as moot.

DATED this 21st day of April, 1986.

---

[1]Since the Court finds that the error in instructions rises to the level of plain and reversible error, it is irrelevant whether the defendants objected to the instructions at the time of trial.

BY THE COURT:



C. ARLEN BEAM, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[From the Bellevue Leader, Dec. 11, 1985]

EX-CITY EMPLOYEE WINS $270,000 IN LAWSUIT

(By Pat Higgins)

A former Bellevue city employee was awarded $270,000 by a jury last week on the grounds that he was the victim of racial discrimination.

David E. Nicholson, Jr., won his case against Doug Clark, Assistant City Administrator and the city. The suit was heard in U.S. District Court under Judge C. Arlen Beam.

Nicholson said he was discharged by the city in 1981 because he was black.

The defendants were Clark, City Administrator Jeff Renner and the city of Bellevue.

Clark, who was in charge of the Community Development program in 1981, was found by the jury to have violated Nicholson's civil rights. Clark was Nicholson's supervisor for the city. Renner was found not to have violated Nicholson's civil rights.

Compensation of $70,000 in lost wages and $200,000 in damages were awarded to Nicholson.

Attorney Fritz Gray, who represented Nicholson, said the jury's award was "adequate."

"It could have been more but it's a fair award," he said. "I believed in Dave. He's 51 years old and has no record of criminal conduct."

The city's attorneys, Joseph Daly and Robert Slovak of the firm Sodero, Daly and Sodero, argued that Nicholson was requested to resign for asking for kickbacks as an inspector-estimator for the city's housing rehabilitation program.

The city has the option of appealing the jury's award to a higher court. Daly had no comment on the case or an appeal. On the advice of Daly, Clark also had no comment.

The case opened Nov. 25. Among those testifying in court were Nicholson, Renner, Clark, Public Safety Director Warren Robinson, Kenny Beaman, a contractor, and Roger Corbin, former head of the city's Community Development program.

Two tapes were played in court. One was a tape made by Beaman of a meeting between he and Nicholson at Beaman's bar called the Miner's Camp. Another was a tape of a Feb. 12, 1981, meeting at City Hall in which Clark asked Nicholson to resign.

Clark and Renner both testified that race had no bearing in their treatment of Nicholson.

Clark said he asked for Nicholson's resignation after numerous complaints from contractors and homeowners concerning Nicholson.

Gray argued that Nicholson was treated unfairly by the city after he filed a complaint in the fall of 1980 to the Nebraska Equal Opportunity Commission.

Corbin testified that there was a change in attitude toward Nicholson in City Hall after he filed the complaint with the NEOC.

"The whole atmosphere changed," Corbin said. "Before the complaint was filed Doug Clark treated him exceptionally well."

Clark testified that he did not treat Nicholson any differently after he filed the complaint with the NEOC and did not retaliate against him in any way.

Corbin hired Nicholson in May of 1979 and was his supervisor until Clark was hired by the city in August of 1980 and was put in charge of the Community Development Block Grant program. Corbin left the city's employ in January of 1981.

On Feb. 9, 1981, Clark sent Renner a memo recommending Nicholson's dismissal. Renner testified that he thought Nicholson should be suspended without pay.

On Feb. 12, 1981, Nicholson taped a meeting between himself, Clark, and Renner's assistant Dan Morris. Clark asked for Nicholson's resignation at that time. He said the city would not prosecute him for criminal acts if he resigned.

In court, Nicholson testified that he felt he was being "constructively discharged" with a choice of resigning or being prosecuted for criminal activity.

Daly asked Nicholson why he resigned if he was not guilty of any crime. Nicholson replied that he was under a lot of strain at the time.

Clark testified he did not tell Nicholson at the Feb. 12 meeting he would be fired if he did not resign.

The tape of the meeting between Beaman and Nicholson at the Miner's Camp in December of 1980 was alleged by the defense to show that Nicholson was acting improperly as a city employee.

Beaman testified that he was led to believe he was being asked to be involved in a kickback scam at that meeting.

"If I played along I would have all the work I needed," Beaman said.

Nicholson said he asked Beaman to do a project for the city's Handyman program because "he did good work."

Daly asked Nicholson if he felt he did anything illegal on the job.

"Not in the slightest," Nicholson said.

Beaman turned the tape over to the police which passed it along to the FBI. No criminal charges were filed against Nicholson.

Re: Nomination of Judge C. Arlen Beam to the 8th Circuit Court of Appeals

OUTLINE

Tab 1 Griffin and McWhorter v. The City of Omaha (two black police women sued the city for race and sex discrimination)

Tab 2 Chambers v. The Omaha Girls Club (a black single pregnant staff member discharged for being single and pregnant while staff member who obtained an abortion retained)

Tab 3 Green affidavit to Nebraska Bar after Beam filed formal disciplinary charges against her when she challenged his double conflict of interest in Chambers case, and attachment portions of Butz v. Economu, 438 U.S. 512

Tab 4 pleadings and orders from the Simmons v. Omaha Girls Club case in which Judge Beam gave absolute immunity to the Nebraska Equal Opportunity Commissioners even though Commissioners are temporary political appointees not insulated from political influence. Judge Beam's wife had recently resigned from the Commission and her official actions were covered by implication by the Judge's order

Tab 5 Newspaper clippings re C. Arlen Beam, his association and paid relationship with Governor Charles Thone and his statement that he would never hear a case in which one of his clients was a party

(Exhibits in Committee files.)

SUMMARY

Conflicts of Interest: Tabs 2, 3, 4 and 4 deal with the Judge's conflicts of interest in hearing cases before him. The Simmons case and the Chambers case were major civil rights cases involving allegations of race, sex and pregnancy discrimination against a white wealthy board of directors, the Omaha World Herald Newspaper and the Nebraska Equal Opportunity Commission and Commissioners. The Judge had a double conflict of interest through his wife a recent former NEOC Commissioner and his former client and friend Governor Charles Thone. The Judge revealed none of his conflicts even though he went to great pains to explain the conflicts of interest to the case of all of his law clerks. The Simmons case was later assigned to Judge Jones of South Dakota and settled. Chambers was tried and the Judge dismissed the jury and dismissed all the constitutional claims and ruled against the plaintiff on Title VII.

Decisions in Race Discrimination Cases:

In Griffin and McWhorter v. the City of Omaha the Judge ignored cruicial evidence in support of the claims by the two black female police officers that they had been discriminated against. When the 8th Circuit reversed him and remanded the case, Judge Beam was defiant in his order on remand.

In Simmons v. Omaha Girls Club and Chambers v. Omaha Girls Club the Judge granted immunity to the NEOC Commissioners, see above. In the Chambers case Judge Urbom merely adopted Judge Beam's decision on immunity made in Simmons. Later after the death of Judge Schatz who was assigned the case, Judge Beam took over the case. In his decision the Judge said that the Club could be exempt from the Pregnancy Discrimination Act because of the location of the Club (all black former ghetto) and the composition of its members (black females ages 8 - 16 years) and that the decision would only apply to the Club and not to other cases making it a special interest judicial ruling.

In the case the wife of the president of the Omaha World Herald Newspaper was on the board of the Omaha Girls Club and she voted in a policy to discharge single pregnant staff members, got her husband to do favorable publicity. One of the Commissioners hearing the case at the NEOC was the wife of the vice president of the paper. The paper is employee owned. The NEOC held an unprecedented ex parte hearing for the Girls Club on the case and the plaintiff was never notified. The NEOC failed to disclose the hearing even after it took place. An international expert Dr. Harriette McAdoo testified that the policy was detrimental, and would have a chilling effect in the black community, would deprive black women of jobs and force women on welfare.

Senator HEFLIN. Thank you.

Judge BEAM. Thank you, Mr. Chairman.

Senator HEFLIN. Our next nominee is Nicholas H. Politan of Livingston, New Jersey to be the U.S. District Judge for the District of New Jersey.

Senator Lautenberg and Senator Bradley have submitted introductory statements in which they commend Nicholas Politan to the committee, and they ask for his speedy confirmation. These will be made a part of the record here.

[The statement of Senator Lautenberg follows:]

PREPARED STATEMENT BY SENATOR FRANK R. LAUTENBERG

Mr. Chairman, I applaud the Committee for moving so promptly to schedule a hearing on the nomination of Nicholas H. Politan, to serve on the United States District Court for the District of New Jersey.

As I stated to Committee last week, the district court in New Jersey is caught in a flood of cases. Courts outside the state have been enlisted to take the spillover.

The situation imposes burdens on the judiciary, the bar, and, most importantly, the litigants who seek from the federal courts in New Jersey a reasonably expeditious resolution of their disputes. Unfortunately, when civil cases are involved, the prompt resolution of disputes is only a goal.

New Jersey has two vacancies on the district court. When Judge Cowen is elevated to the Court of Appeals, there will be three. Moving without delay to fill these vacancies can assist the court is addressing the backlog and enhancing the administration of justice in New Jersey.

Nicholas Politan merits your favorable consideration. He has been involved in the general practice of law for over 25 years. He achieved distinction as a law student, serving as a managing editor of the Rutgers Law Review. He was a law clerk for a judge on the U.S. Court of Appeals for the Third Circuit. Thereafter, he entered the private practice of law in New Jersey, for most of that time in partnership with James Cecchi. Mr. Politan was, until several years ago, an active litigator, trying cases in the state and federal courts. Mr. Politan, as counsel to an association of textile firms in New Jersey, gained experience in the negotiation of collective bargaining agreements, the resolution of grievances, and the management of a pension fund.

However, the career path that has brought Mr. Politan to this Committee is not entirely a typically one. Mr. Politan has also been involved in business. In 1978, he acquired with Mr. Cecchi a controlling interest in a state chartered community bank. He dedicated a significant part of his time thereafter to the banking business. Still, Mr. Politan continued to manage his law firm, which had grown in size, and to directly manage a few cases a year. Mr. Politan's business experience would enable him to bring to the bench a practical knowledge and understanding of commercial matters that should prove useful.

I have met with Mr. Politan. He has expressed to me his love of the law and his most sincere commitment to serve the public as a member of the federal judiciary. Those who know of him speak well of him. I commend him to you.

[The statement of Senator Bradley follows:]

PREPARED STATEMENT BY SENATOR BILL BRADLEY

Mr. Chairman, I am pleased to support the nomination of Nicholas H. Politan to fill a vacancy in the Federal District Court for New Jersey.

I have appeared before this committee on a number of occasions voicing concern about the backlog in the Federal courts and, particularly the Federal District Court for New Jersey. The current caseload is over 500 cases per judge and there are 6400 cases pending before the district court. This is almost a 10% increase over last year. But even this doesn't tell the full story. Each year the cases are more complicated, with more defendents per case. This means longer trials. And the Federal District Court for New Jersey is contending with this backlog with two fewer judges than are authorized. This is simply unacceptable. No judge can give proper attention to his or her cases under those circumstances.

Therefore, I am particularly grateful to the Judiciary Committee for giving the nomination of Mr. Politan such prompt attention. The chief judge of the Federal

District Court, Judge Clarkson Fisher, has appealed for help in filling the outstanding vacancies and the Committee has been extremely responsive.

The President has submitted the name of Nicholas Politan to fill one of the vacancies in New Jersey. Mr. Politan has been an attorney in private practice in New Jersey for 26 years. He is admitted to practice before the Supreme Court of New Jersey, the Federal District Court, U.S. Court of Appeals, U.S. Tax Court, and the U.S. Supreme Court. His practice has been diverse—both civil and criminal—as have his clients. He has represented corporate, labor and individual clients.

Because I was not familiar with Mr. Politan prior to his nomination, I sought the opinions of the legal community in New Jersey. I am pleased to report that all whom I asked reported that Mr. Politan was a fine attorney and all believed that he would make a fine judge in the Federal District Court.

For that reason, I am pleased to commend Nicholas Politan to the committee and ask for his speedy confirmation.

Senator HEFLIN. Mr. Politan, if you will raise your right hand and take the oath.

Do you solemnly swear that the testimony that you will give before this committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. POLITAN. So help me God.

Senator HEFLIN. Well, we are delighted to see you here. Would you like to introduce members of your family or friends or both that are with you?

TESTIMONY OF NICHOLAS H. POLITAN, LIVINGSTON, NJ

Mr. POLITAN. Thank you, Mr. Chairman.

I have with me this morning my wife, Marian, sitting in back; my youngest son, Vincent; my oldest son, Nicholas, is a lawyer in San Francisco and unfortunately could not make it here today, but his spirit is with us. I have sitting in back three of my law partners and one of the wives. I have James Cecchi, my law partner; Jan Brody, my law partner; John Agnello, my law partner; Mr. Cecchi's wife, Lucille; and we hope an aspiring young lawyer who will join their firm, James, Jr., sitting in back of his father.

Senator HEFLIN. Well, thank you. We're delighted to have you. I hope there are some partners to tend to business today.

Mr. Politan, the majority of the ABA Standing Committee on Federal Judiciary rated you qualified for the position to which you have been nominated. However, a minority of the committee rated you not qualified.

Do you have any idea why a minority of the ABA committee thought you were not qualified?

Mr. POLITAN. Well, Mr. Chairman, in reviewing my background in the practice of law and otherwise, I have been practicing law since 1960, which is approximately 27 years. During the latter 4 or 5 years of my career, I was fortunate enough to have a controlling interest in a bank, which took some of my time from the practice of law. However, prior to that time I was in court answering the calendar call each and every day for a 20-year period of time.

Once we took control of the bank, I had to spend some of my time with the bank and the balance of my time with the law office. At the law office I engaged more in a supervisory capacity over the last couple of years, not actively being in court each and every day, although I did try cases. If the client wished it, I was there trying the case. I did actively supervise and continue to actively supervise

the entire operation of the law office, which now has nine members.

The two gentlemen that I introduced, Mr. Brody and Mr. Agnello, were born in the law at my side. They were my law clerks when they were in law school. They joined the firm after that. I am proud to say I taught them everything that I knew, and I think perhaps they know more.

And the only thing I can indicate is that perhaps because of this dual function that I've been doing for the last 4 or 5 years, it may be that the ABA felt that I had not been in active trial practice recently. I can tell you this, Mr. Chairman: I learned to ride the bicycle. I learned to ride it very, very well in 20 years. I was in the pit. I know how to try cases, and I can assure you that I have the ability to be a judge.

Senator HEFLIN. In 1980 you made a career decision to spend less time in litigation and more time on the business—the bank that you and your partner purchased.

Now you are a nominee for the Federal bench. Have you changed your mind on how closely you wish to be involved in litigation?

Mr. POLITAN. I never left litigation, Mr. Chairman. I always have been in litigation, continue to be in litigation, and continue to supervise litigation.

To me, being a lawyer is trying a case. It's the most important function that a lawyer can have, and I enjoy every minute of it. And I look forward hopefully, if I am confirmed here, to be back in the trial court on an every-day basis.

Senator HEFLIN. Senators Bradley and Lautenberg, in urging the committee to proceed expeditiously with your nomination, stress the backlog that now exists in the New Jersey District Court.

At present there are two vacancies, and a third will be created when Judge Cowan is elevated to the court of appeals. Since we have already had a hearing on Judge Cowan's nomination, that elevation would come soon. And it will take a while for his replacement on the district court to be nominated.

Are you prepared to hit the ground running and assume the full caseload on this overworked district court?

Mr. POLITAN. Mr. Chairman, if it were tomorrow morning, I'd be there.

Senator HEFLIN. I would also like to get on the record the chronology of the nomination process in your case. The position to which you were nominated became vacant on January 4, 1987 when Judge Herbert Stern resigned. Is that correct?

Mr. POLITAN. That is correct.

Senator HEFLIN. You have told the committee that you were interviewed on three separate occasions by various officials of the Department of Justice.

Approximately when did those interviews take place?

Mr. POLITAN. My recollection, Mr. Chairman, is I had an initial interview in October of 1986, I believe another one toward the end of 1986, and one in the early part of 1987.

Senator HEFLIN. You were nominated on August 7, 1987, once the vacancy occurred. Is that correct?

Mr. POLITAN. That is correct.

Senator HEFLIN. And your hearing today is taking place about two and one half months after you were nominated. Is that correct?

Mr. POLITAN. That is correct, Mr. Chairman.

Senator HEFLIN. In your years as a litigator you appeared before a variety of courts and a spectrum of trial judges from excellent to not so good.

What are the most important qualities for success as a trial judge? What is the most difficult challenge you face in moving from the role of an advocate to the role of a judge, and how do you plan to meet that challenge?

Mr. POLITAN. Mr. Chairman, it seems to me that you get a different perspective when you get on the bench. For once in your life you have the luxury of being able to look at a matter with totally objective eyes, without any client to satisfy or any cause to espouse except the cause of justice and to bring to the litigants in the proceeding a full, complete, and final decision in whatever matter is before you.

I look forward to the transition. I'm reading everything that I can get my hands on from the Judicial Center and otherwise to make the transition as easy as possible and as quickly as possible.

Senator HEFLIN. Senator Thurmond, do you have any questions?

Senator THURMOND. Thank you.

Some points have been raised about your spending part of your time in business. I personally feel a person makes a better judge if he has spent time in business or spent time in farming or in other ways to make a living. I think he understands human nature better.

I have seen some lawyers that just grew up practicing law. They had no experience in working or business or farming or anything of the kind, and I don't think they really have the background that's helpful to them later in judging people.

And that's what you do: You have to judge people. And you have to judge them according to the law.

So on that point, I just want to say that it's my judgment that anyone who has done other things besides just being a plain lawyer adds to his background and his depth of humanity.

You heard the two questions I asked the previous nominee. One is judicial activism, and the other is judicial temperament.

Would you express yourself on those two matters?

Mr. POLITAN. Senator, I believe there are three equal branches of government.

Senator THURMOND. Speak louder. I can't hear you.

Mr. POLITAN. I believe there are three equal branches of government. One is the judiciary.

I think the judiciary has its place, and it must do its job--not to invade that of the executive nor of the legislative branch. We're there to judge cases and controversies as they come before us and to give a speedy resolution toward them. We're not there to--if you would--run other institutions or invade the province of the legislature and/or the executive.

As far as judicial temperament is concerned, I have been on this side of the bench for a great number of years. I think it's very important that a judge treat the lawyers in his courtroom with re-

spect, that he listen very carefully to their arguments and then make a judgment on them and express himself to those lawyers so that the lawyers understand exactly what the basis of the decision is.

You've got to be calm; you've got to be cool; you've got to be collected. And you've got to put your best effort forward and, most importantly, be prepared. I think if you are prepared, you can exercise your function as a judge much better than you can imagine.

Senator THURMOND. I am sure a judge at times feels that the law is just not what it should be and that he is tempted to want to correct it. But that's not his job.

His job is to take the law and the Constitution as it is written. And then if there are any changes to be made, that's up to the Congress. Do you agree with that?

Mr. POLITAN. Yes, sir.

Senator THURMOND. I have no other questions, Mr. Chairman.

Thank you very much.

Senator HEFLIN. There will probably be written questions addressed to you. We would appreciate the prompt answers to any written questions on that.

[Written questions to Mr. Politan follow:]

QUESTION ON CLUB MEMBERSHIP

QUESTION: You are a member of a club in New York, the Tiro A. Segno organization, that does not permit women to be full members. Please describe this club's activities and your participation in them.

The ABA Code of Judicial Conduct states that it is inappropriate for a judge to belong to an organization that invidiously discriminates on the basis of gender. Have you thought about whether the Tiro A. Segno club practices invidious discrimination, and whether your continued membership would be consistent with your ethical obligations as a judge? If so, what have you concluded, and why?

ANSWER: I am a member of Tiro A. Segno of New York, Inc., a small family dining club located in New York City. This club was originally founded in the late 1800's by Italian immigrants who would shoot pigeons in what is now Central Park and bring them to the club house to be cooked and eaten by the members and their families. Over the course of years, the club developed into a dinner club, where members and their families and friends use the facilities for dining.

The voting membership of the club is restricted to men of Italian ancestry. However, the club does not restrict its use to the named family member. Wives, children and guests of members are permitted full access to all of the club's dining facilities. The non-voting membership is not restricted to men of Italian descent. In addition, wives of deceased members continue to maintain membership throughout their lives. It is not a business luncheon club, but rather, a more traditional ethnically oriented social club.

For the foregoing reasons, I do not consider this club one which practices invidious discrimination and I do not believe that my continued membership will be contrary to my ethical obligation as a judge.

Nicholas H. Politan

Senator HEFLIN. Thank you very much.

Mr. POLITAN. Thank you, sir.

Senator HEFLIN. The next nominee is Mr. Rodney Webb of Fargo, North Dakota to be the U.S. District Judge for the District of North Dakota.

Mr. Webb, if you will raise your right hand and take the oath, please, sir.

Do you solemnly swear that the testimony you will give before this committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. WEBB. I do so swear.

Senator HEFLIN. Thank you.

Would you like to introduce members of your family and friends that might be with you?

TESTIMONY OF RODNEY S. WEBB, FARGO, ND

Mr. WEBB. Thank you, Senator. I would be pleased.

My son, Wade, a high school student in Fargo, is with me. And I am proud to have him here. Unfortunately, my wife, Betty, cannot be here. We have a seventh-grade daughter Susan at home, who is attending school there. I have two children, Crystal and Todd, who are both law students. They would like to be here. In fact, Todd called me yesterday, but the expense wouldn't permit the trip; an older daughter, Sharon, is a nurse in Grand Forks.

May it please the committee, I would like to make a couple of comments before questions, if that would be all right.

Senator HEFLIN. All right, sir. Just let me—I want to read the statement of Senator Quentin Burdick first.

I want to begin by thanking you for holding this hearing today. Your committee has had an extraordinary year, and I am glad that you have not forgotten those States that find themselves one judge short in the wrong year.

At the same time, I regret that prior arrangements have prevented me from appearing in person to introduce this nominee. I understand the difficulty in scheduling hearings at this time, and I appreciate the efforts of the chairman in assuring that as many vacancies as possible will be filled.

Mr. Chairman, I am pleased to introduce Mr. Rodney Webb in the Judiciary Committee today. As a distinguished attorney who is currently serving as a U.S. attorney for the District of North Dakota, he is certainly qualified for the Federal bench.

Mr. Chairman, I hope the committee moves quickly ahead now to complete action on this nominee so that North Dakota can finally fill this empty seat.

I thank you again for your help with this nomination.

Mr. Webb, go right ahead and make any statement you would like.

Mr. WEBB. First I would like to inform you Mr. Chairman and Senator Thurmond that since Senator Conrad could not be here; his administrative assistant Mr. Gorman King, is here with me sitting with my son. I appreciate his being here.

I want to make sure that it's well understood what a great privilege I feel at the honor that has been bestowed on me to be nominated. This has been a life-long dream. And if I seem excited or nervous, I am.

There are couple of things in the record that I would like to correct.

One thing is that there are no lawsuits now pending against me. There was a question as to whether or not there were any lawsuits

against me, and unfortunately, as U.S. attorney, I get sued once in a while.

Well, I can answer you now that all of those cases have been dismissed—the ones against me as U.S. attorney—because they were frivolous. The one that was based on vicarious responsibility for my law partner has been voluntarily dismissed.

I don't think there was any question that directly related to how I might perform as a U.S. attorney.

Our offices are evaluated regularly. The last time my office was evaluated, I was given the highest possible rating for an office of my size. I am proud of that and I think it's important for the Senate to know.

I would ask the Senate committee to recognize that I think of myself as a trial lawyer. I have been a defense lawyer for about 8 years, and have been a prosecutor on two different occasions. I was a municipal judge for 6 years.

I think of myself also as an agricultural lawyer, Senator Thurmond. I am from an agricultural community, my practice—private practice—was directed toward agriculture, and even now my primary clients are agricultural agencies.

Last evening when we were on the plane coming down here—Judge Miles Lord, a retired judge from Minneapolis, stopped me. Former Vice President Mondale was on the plane. Judge Lord introduced us—my son and I—to him that was quite a privilege. He gave me some counsel—two things.

First of all, if the Twins win, make sure that that's on the record of the Senate Judiciary Committee. I would like that to be on the record. The Minnesota Twins are World Series champs, and we in the Upper Midwest are very, very proud.

Second, his other counsel to me was, "Be brief."

Senator HEFLIN. All right, sir.

The committee has received correspondence from several citizens that raised questions about your action as U.S. attorney as a private practitioner. Some of these complaints involve specific cases, and some of these cases may be ongoing. Therefore, I'll not ask you about these issues at this hearing.

The committee will address some written questions to you on these topics as well as perhaps other topics. If you will answer them promptly, that will expedite the committee's action for your nomination.

Throughout most of the 1970's you served as a part-time special assistant attorney general of North Dakota with specific responsibility for legal work involving the state school for the mentally handicapped.

Please describe the major legal responsibilities of this position during the time that you occupied it.

Mr. WEBB. Initially in the early 1970's, Mr. Chairman, the responsibility was to aid in changing the philosophy of the institution. The governor at that time had directed that the institution change from a strictly caring institution to an educational as well as a caring institution. That was one of my major responsibilities.

We went through a large de-institutionalization program. There was a major effort to secure supplemental security income through

Social Security to finance de-institutionalized residents; it was, in the main, successful.

I was also advisor to the business manager and provided legal counsel in collection matters.

Late in my tenure, there was dissatisfaction expressed by an organized group—the ARC (Association for Retarded Citizens)—with the quality of care that was given to mentally retarded residents at the Grafton State School.

My duty was to present the philosophies of a Democratic governor and a Republican governor, three different institutional directors, and two different attorneys general. I advocated the cause of the State administration.

The ARC took a plaintiff position and began a lawsuit in late 1980. I left the private practice in 1981.

The ARC and the State of North Dakota were cast in adversarial roles and there was some disagreement. There was never any disagreement, however, from either the ARC or the State, with the proposition that all parties wanted better things for mentally retarded residents of the school. And in fact, the legislature appropriated $116 million in additional funds for the mentally retarded—just before this lawsuit was filed.

I guess where I want to leave this issue, Senator, is that with the help of the ARC, we in North Dakota have done better by our retarded citizens.

Senator HEFLIN. What is your attitude towards the civil rights of mentally handicapped persons? Can you assure this committee that the rights of mentally handicapped citizens of North Dakota and from whatever State might be would be fully protected in your courtroom? What can you point to in your background that best demonstrates that you will carry out this pledge?

Mr. WEBB. Well, first of all, Senator, I do pledge that to you. The civil rights of those people need the protection of advocates in our system.

Some history—I spent 21 years in private practice in Grafton, N.D., a small agricultural community of 6,000 people. That's where the State school is located, and the residents are part of our community. We accept the residents, we live with them, we love them, we play with them.

The school is being diminished in size as a result of the lawsuit.

To give you some assurance of my personal views—I think perhaps the ABA investigation might best demonstrate it. I believe that the report to you from the ABA shows that I rate very highly in temperament and in fairness. I think those are the highest categories of rating. Certainly your investigator could check that.

I was told that my contemporaries feel that my demonstrated attitude toward the underprivileged is excellent. I assure you that it is.

Senator HEFLIN. There have been hard times in North Dakota recently, as in many agricultural States. Many farmers have lost their land. Some farmers may have committed illegal or wrongful acts in trying to keep their land and keep food on their families' tables.

You have been in the thick of this controversy as U.S. attorney. You have prosecuted several important cases charging that farm-

ers have defrauded Federal farm credit agencies and banks. I know that in your private practice before you became a U.S. attorney you represented many farmers and also represented creditors of farmers.

The committee has received several letters from North Dakotans that charge in essence that as U.S. attorney, you have favored creditors and banks dealt partially with farmers. This is a concern that goes beyond any specific case.

How do you respond to this charge?

Mr. WEBB. Mr. Chairman, it's my job to enforce the law. I have personally taken charge of several prosecutions—four of them actually in 1985—concerning agricultural fraud.

If there has been any teaching point or learning point coming out of those prosecutions, it is that you cannot steal when you are in trouble.

I am proud to say that in North Dakota, we do not have any problem with the quality of our farmers. They are top-notch and honest.

Keeping the nest clean is my job as a prosecutor. Once in a while when farmers don't understand the necessity to obey the law or when others don't understand that, they have to be prosecuted.

Senator HEFLIN. I understand that a significant portion of the caseload of the U.S. Attorney's Office in North Dakota consists of cases involving American Indians.

What special problem has this posed for you as U.S. attorney, and how have you met them?

Mr. WEBB. Let me add to my previous response.

I believe one of the complaints you received on the farm issue was from an organization called FLAP. That organization really doesn't exist other than to send you a letter.

The author of that letter is a tax protestor. I don't think there is any question about that identification. He was a personal friend of two of the people I prosecuted. So he understandably probably doesn't like me.

As far as the prosecution on the Indian reservations—yes, we do have the primary obligation for prosecution of the major crimes on the four Indian reservations in North Dakota. We do so diligently and our reputation is excellent in that regard.

I personally handled several cases concerning child abuse on the Indian reservation.

Senator HEFLIN. Your role in the case of *United States* v. *Warner* has been questioned by some North Dakotans.

This case involved the prosecution of non-Indian members of the Native American Church for possession of peyote, a controlled substance. Federal drug law provides an exemption for religious use of peyote by this church and states that members of the Native American Church so using peyote are exempt from registration.

When you decided to prosecute the Warners, what consideration did you give to this statutory exemption? What consideration did you give to the impact of the first amendment, which prevents the Government from interfering with the free exercise of religion?

Mr. WEBB. Mr. and Mrs. Warner are not Indian. They did not claim to be Indian and disavowed any Indian blood.

The exemption you mention, Mr. Chairman, is for Indians who belong to the Native American Church. They did not belong to the Native American Church in the sui generis sense.

They had peyote in their possession. I felt that the exemption did not apply and made the decision to prosecute because of those facts.

The prosecution was presented, a first amendment challenge was made and the judge made a ruling on the law that the first amendment did not apply. The Timothy Leary example was cited and used by the judge in that decision.

It is true that after an extended lawsuit, the jury felt that these people honestly were practicing their religious beliefs.

I now believe that the Warners were honestly practicing their religious beliefs. The law simply did not provide an exemption for them.

The trial judge, by the way, said that this was probably the most interesting case he had ever heard as a judge. We heard wonderful, good people from both sides testify and give the court and jury their points of view in that trial. The case, I believe, was properly presented for trial.

Senator HEFLIN. There appears to be a strong and sometimes violent tax protestor movement in the Upper Midwest which has touched North Dakota. During your tenure as U.S. attorney, there was a violent confrontation between a tax protestor—a Gordon Kahl—and law enforcement officers which resulted in the killing of a deputy U.S. marshal.

What involvement did you have in this matter?

Mr. WEBB. The United States marshal—presidentially appointed—Kenneth Muir, was a personal friend of mine. He was killed on the 13th of February, 1983. Another deputy marshal was also killed in that altercation.

The killers were members of a tax protest group. I can identify them as killers because two of them were convicted by a jury and given double life sentences. The leader, Mr. Gordon Kahl, was unfortunately killed in a shoot-out in Arkansas.

These individuals believe so strongly in their views and tax protest that Mr. Kahl had stated that he felt that he got his word from Jesus Christ directly.

It was a scary time. It was a terrible time.

Kenneth Muir and I had visited Indian reservations together, slept in the same room together. He was a friend.

There is a learning point. We're not used to violence in our country—the learning point was you cannot change the law through violence.

Senator HEFLIN. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Webb, I believe you are a Mason. I don't think that will be against you now. As I said, it shouldn't be.

Mr. Webb, you are a U.S. attorney, and you have tried a lot of cases.

Mr. WEBB. Yes.

Senator THURMOND. You have heard what I said about judicial temperament.

Mr. WEBB. I agree with it.

Senator THURMOND. Do you agree with that?

Mr. WEBB. Yes.

Senator THURMOND. You heard what I said about judicial activism?

Mr. WEBB. Yes. I agree with you.

Senator THURMOND. Do you agree with that?

Mr. WEBB. Yes.

Senator THURMOND. I want to ask you one question here.

What would be the duty of a Federal judge when confronted with a case in which a precedent of the court clearly conflicts with the Constitution as a judge interprets it? How would you handle that?

Mr. WEBB. As a judge, I would be bound by precedent the law, and the Constitution.

If my personal views were different, I would feel free to express them, but I would not feel free to overturn precedent.

Senator THURMOND. And thus leave it to a higher court to decide it.

Mr. WEBB. Yes.

Senator THURMOND. I think that's all the questions I have.

I hope you have a happy tenure on the bench.

I want to say your nomination has been here for 6 months. And I think it's inexcusable that this committee hasn't heard it before now. The present presiding officer is not to blame for that.

But I do hope that this will not occur in other nominations. I think these nominations ought to be brought up and either approved or disapproved and not keep nominees waiting for 6 months.

Mr. WEBB. Thank you.

Senator THURMOND. I hope you have a happy tenure of service on the bench.

Mr. WEBB. Can I bring up one other matter, Senator?

My former partner and mentor was a man by the name of Ringsak. He was chosen by President Ford as the outstanding handicapped American in 1975. He was a politician, a proud and wonderful person.

I would not want to miss the opportunity to convey to you advice he has always preached. If you want a vote, please ask for it. I would please ask you to support my nomination.

Thank you very much for giving me this time.

Senator HEFLIN. Well, thank you, sir. I have been handed a slip from staff that says that the vacancy occurred 17 months prior to the nomination.

We will submit written questions, and, if you will, we would appreciate your expeditious answering of the questions and returning them to us.

[Written questions to Mr. Webb follow:]

QUESTION ON ORGANIZATIONAL MEMBERSHIPS

QUESTION: You indicated in your response to the revised Committee questionnaire that you are a member of Masonic organizations in North Dakota. While, as you point out, these organizations include members of different races, the Committee is aware that Masonic organizations open to men are generally not open to women.

The ABA Code of Judicial Conduct states that it is inappropriate for a judge to belong to any organization which invidiously discriminates on the basis of gender.

Have you satisfied yourself that the all-male organizations to which you belong do not invidiously discriminate against women, and that therefore it is appropriate for you to maintain your membership if you are confirmed as a federal judge? If so, please explain the basis for your conclusion that these organizations do not invidiously discriminate.

ANSWER: Yes. While I have not been particularly active in the Masonic Lodge recently I have always been proud of my membership in that organization. Masonic bodies have a long and envious record of philanthropic activity which has brought honor and distinction to this fraternal order. Invidious discrimination implies an excited ill will or offensive nature of gender based distinction which is a criticism I do not believe is either prevalent or well founded.

Rodney S. Webb

QUESTION FOR MR. WEBB CONCERNING
REPRESENTATION OF GRAFTON STATE SCHOOL

Please respond to the following specific allegations concerning events at the Grafton State School during the time when you represented the school administration as special Assistant Attorney General.

1. It has been alleged that a professional staff member at the school sexually abused female residents on numerous occasions. It is further alleged that no prosecution of the staff member was attempted, and that he was permitted to resign and was given a favorable letter of recommendation, which assisted him in obtaining employment at a similar institution in a neighboring state.

Please state whether, to your knowledge, these allegations are true, and describe your role in the alleged incident.

2. It has been alleged that high-ranking administrators at the school were appropriating antique furniture from the institution for their own use. It is further alleged that, in your role as special Assistant Attorney General, you urged state officials to terminate an investigation of these charges. It is further alleged that the administrators were permitted to resign after returning the furniture, and that no criminal prosecution was initiated.

Please state whether, to your knowledge, these allegations are true, and describe your role in this alleged incident.

3. Please describe the process by which allegations of inadequate medical and dental treatment of residents came to your attention as special Assistant Attorney General, and how you investigated and resolved such allegations.

4. Please describe the process by which accidental deaths of or injuries to residents came to your attention as special Assistant Attorney General, and how you followed up on such reports.

Please provide a general description of your duties and responsibilities as special Assistant Attorney General with respect to allegations of criminal activity, mismanagement, or negligence on the part of administrators and staff at the Grafton State School. Were you authorized to pursue criminal prosecutions, administrative sanctions, or other corrective action if these allegations appeared to be well founded? Was it your responsibility to report such allegations to other state authorities? If so, please identify the authority to which such allegations were to be directed.

During the period January, 1972, to September, 1981, I served as a special Assistant Attorney General of the State of North Dakota assigned to provide legal advice to Superintendent of the Grafton State School. The school is located at Grafton, North Dakota, and is the state institution which provides care and education for the mentally handicapped of the state. My position was that of a part-time legal advisor and generally required several hours work per week. The school had full-time legal counsel in Bismarck, North Dakota. The institution was supervised by the Director of Institutions at Bismarck. I had no decision making function but served as local legal advisor.

1. Nordmark Matter:

Dr. Vernon Nordmark, full-time professional staff member, was alleged to have harassed and had sexual contact with other employees. Any sexual contact with residents was, at most, unsubstantiated rumor. My roll in this matter was very limited since the Director of Institutions and the full-time legal counsel from Bismarck flew to Grafton and met with Dr. Nordmark. I have been advised by Mr. Ed Klecker, the Director of Institutions at that time, that Dr. Nordmark was advised by him to resign immediately or be fired. Dr. Nordmark resigned. I did not meet with Dr. Nordmark. This incident, as well as all other incidents of possible criminal impropriety, was reported to the local state's attorney.

2. Lorinser Matter:

Gary Lorinser served as Business Manager of the State School. Mr. Lorinser did, without authority, take old furniture from a building which was being demolished. Other employees had also taken mementos from the old building but promptly returned the items when properly advised that there was no authority to take items from the building even as a souvenir. Mr. Lorinser knew of the direction of Superintendent Ronald Archer to stop the taking of mementos but continued his conduct of taking or holding the furniture. Mr. Lorinser was wrong and should have known better. The state's attorney of the county was promptly notified. I made no effort to terminate the investigation; rather, I regarded Mr. Lorinser's conduct to be criminal and stupid. The termination of Mr. Lorinser's employment was handled by the Director of Institutions.

3. Medical and Dental:

It was not within my area or responsibility to either receive or act upon allegations of inadequate medical and dental treatment of residents.

4. Accidental Death or Injury:

A special review panel was set up to review all incidents of accidental death or injury. Stringent guidelines and procedures had been set up in this regard.

Initially my primary duty as part-time legal advisor at the school was to aid in the collection of accounts due from patients and relatives for care provided; the state legislature changed the law in about 1975 at the urging of the Administration eliminating much of this fee for care responsibility. The institution housed about 1400 residents in 1972 which gradually reduced to about 800-1000 in 1981; I was tasked with assisting in the deinstitutionalization program by assisting in negotiating halfway house contracts. A major legal case effort which I handled concerned our successful challenge to the Social Security Administration's denial of federal supplemental security income support for the outpatient placement and educational program. I did provide initial advice to the Superintendent on all types of immediate problems including claims of neglect and crime. I had no authority to instigate criminal prosecutions, administrative sanctions or other corrective action. I reported any such allegations to the Superintendent (Dr. Ronald Archer, now deceased) and to the Director of Institutions in Bismarck, North Dakota, Mr. Klecker. (In Mr. Klecker's absence I would often report to Mr. Ed Zuren, full-time attorney within the Director's office) If the matter involved civil or criminal legal proceedings, I would also report to the Attorney General of the state.

I am authorized to inform the committee that the former Director of Institutions, Mr. Ed Klecker (701-255-4011, Ext. 295) invites further inquiry on State School matters.

QUESTION FOR MR. WEBB ON ALLEGATIONS OF MR. AND MRS. BARIA

Dorab N. and Eleanor F. Baria have made several allegations concerning your professional conduct while in private practice. Some, but not all, of these allegations were the subject of a complaint to the North Dakota Supreme Court in 1981, and were dismissed as unfounded by an inquiry committee.

A portion of Mr. and Mrs. Baria's submission, which summarizes their complaints, is enclosed. Please identify which allegations were the subject of their 1981 complaint. Please respond to each allegation.

Response to this question is made out of courtesy to the Senate Judiciary Committee. I certainly do not mean to give any dignity to the accusations by this detailed response. Mrs. Baria has no rational cause to raise the complaints against me. Her accusations are a product of her demented mind. I have been fair and honest in my dealings with Mrs. Baria. Though I have met Dorab Baria on one or two occasions I have never had any business dealings with him. Mrs. Baria likewise resents her own sister, Margaret, for her role in seeking medical help for Eleanor in 1969. Mrs. Baria also has publicly criticized the Walsh County Probate Judge without cause for his handling of her mother's estate. It is indeed sobering and scary to recognize that Mrs. Baria can so viciously attack my character without any reasonable justification.

By way of some brief history of this matter, I first became acquainted with Elmer Murray in 1959-1960 when he served as an administrator of an estate I was retained to handle. Mr. Murray and I subsequently became friends. I assisted Mr. Murray with some minor legal matters over the years and in the middle 1960's I was retained by him to help him in planning his estate. The object of the plan was to provide financial protection to his spouse, Annie, while eventually vesting title of the two quarters of farm land equally in the two Murray children, Margaret Dub and Eleanor Baria, and avoiding estate tax to the extent possible. The plan was to transfer the land to the Murray daughters in two steps so as to avoid all the estate value being taxed at the time of the last spousal death. This plan was accomplished initially by a gift transfer to the two daughters with life income reserved to Elmer and Annie Murray. The second quarter of land devised to the Murray daughters equally through the Annie Murray estate. The plan worked well in that the land was received by the two Murray daughters with only a few hundred dollars of estate tax. I believe even the Barias' recognize that thousands of dollars in state and federal estate tax was saved through this estate plan.

During the course of the probate of the Annie Murray estate, Mrs. Baria almost immediately demonstrated her distrust of both me and her sister, Mrs. Dub. Mrs. Dub has often expressed her embarrassment for her sister's harassment of me. I believe that Mrs. Baria probably resents me for the reason that I advised Mr. and Mrs. Murray as to the method they would be legally required to follow in order to have their daughter judicially committed to a state institution for mental illness treatment. Records of the Walsh County Court at Grafton, North Dakota, show that Eleanor Murray (now Baria) (date of birth December 14, 1943) was twice legally committed in 1969 by the Walsh County Mental Health Board to the North Dakota State Hospital for the Mentally Ill. The application shows depression as a reason for needing mental health care. The first hospitalization was from May 27, 1969, to July 2, 1969, and the second hospitalization period was from October 30, 1969, with discharge on December 4, 1979. The records further show that the commitment was for evaluation and treatment of mental illness.

The following allegations were subject of the 1981 complaint which complaint was dismissed by the Inquiry Committee (East) of the North Dakota State Bar Association as being unfounded.

Allegation - Swindling Clients, Item 3
Allegation - Harassing Clients
Allegation - Harassing a Party in a Legal Transaction who was not a Client

Response to each Allegation

Allegation - Evading Taxes:

There is no basis for any accusation of wrongdoing. North Dakota and Minnesota do not now and have never levied a state gift tax. The federal gift tax marital deduction is now and has been unlimited for many years. Even if any of these transactions were gifts, the law did not require the payment of any tax. Betty Webb did, in fact, work outside the home as a medical and X-ray technician for several years prior to as well as subsequent to our marriage.

Allegation - Swindling Clients, Dusterhoft:

I did acquire ownership of 240 acres (209 acres tillable) farm land from Irene Dusterhoft Robertson and her adult children by purchase for $41,100 on December 30, 1970. At the time of the purchase, the Dusterhoft estate had been closed for several years and the land had been publicly offered for sale for 2-1/2 years. Mrs. Robertson and her children had the counsel of

Mrs. Robertson's husband, Gene, as well as long time family friend and neighbor Vernon Campbell. I understand the family also visited with two other attorneys during their attempts to sell the land. The annual rental return on this land at the time of the sale was $15 per acre ($15 x 209 acres = $3 135) which when capitalized shows that the price was fair at that time. It is correct that the land is of good quality and did subsequently increase in value; however, no one could have anticipated the China trade agreements of the early 1970's which were a boon to agriculture and caused an increase in farm land value. I believe it important for the committee to note that the Barias' acknowledge the former owner does not feel cheated.

Allegation - Swindling Clients, Bradock:

The Bradocks were dear clients for many years. Barias have drawn an unfounded assumption of impropriety by inspecting cold land records without knowing the truth of the transaction. The fact is that in 1971 Minnesota law would not recognize the creation of a joint tenancy ownership in real estate by direct transfer from one of the joint tenants as a grantee. A "strawman" was a legal necessity; my wife and I served as "strawman" to aid the Bradocks in creation of their desired ownership.

Allegation - Swindling Clients, Murray Estate:

The fact of the matter is that there was an IRS office audit of the Annie Murray Estate Tax Return Form 706. The primary question involved land value. My successful technique in meeting the challenge was to provide comparable sale data to the IRS auditor by mail. It is my recollection that the name of the IRS estate tax auditor was Marilyn Makula.

Allegation - Harassing Clients - Annie Murray Estate:

This matter has been completely explained to the Inquiry Committee (East) of the North Dakota State Bar Association in 1981 and that complaint was dismissed as being completely unfounded. The accusations include gross distortions of fact and conclusions which can only be explained by Mrs. Baria's obvious dislike of me. My response is that I was fair and honest with Mrs. Baria though I was frustrated and upset by her conduct. I do not completely understand the Barias' obvious anger.

Allegation - Harassing a Party in a Legal Transaction who was not a Client:

This allegation is related to the previous allegation and is answered in substance above. The land inherited by the Murray daughters, Margaret and Eleanor, was received as tenants in common. Mrs. Baria demanded a legal partition of the land. After much argument and heartache, Mrs. Dub gave in to her sister's demands and the partition was accomplished in exactly the manner desired by Mrs. Baria.

QUESTION FOR MR. WEBB ON RETALIATION AGAINST DEPUTY U. S. MARSHAL

A former deputy U. S. Marshal has alleged that, after he testified under subpoena as a defense witness in a federal prosecution in North Dakota, you sought to have him transferred to another state, even though he was slated to retire within a few months thereafter.

Please respond to this allegation. If you sought to have the deputy U. S. Marshal transferred, please state your reasons for doing so.

This question must refer to the case of United States v. Faul, 748 F.2d 1204 (8th Cir. 1984), cert. denied, 472 U.S. 1027 (1985). On February 13, 1983, United States Marshal Kenneth Muir and Deputy Marshal Robert Cheshire were murdered in a gun battle with a tax protest group lead by federal fugitive Gordon Kahl. Gordon Kahl fled the Medina, North Dakota, murder scene (Gordon Kahl was killed in a shootout with law men in Arkansas in June, 1983) but two of the other shooters, Yori Kahl and Scott Faul, were tried and convicted of the two murders in United States District Court for the District of North Dakota. Yori Kahl, son of Gordon Kahl, and Scott Faul were each sentenced to serve double life terms in federal prison.

The former deputy United States Marshal referred to in the question undoubtedly is Harold C. Warren. Mr. Warren served as United States Marshal for North Dakota from 1976-1980 following appointment by President Carter. Mr. Warren and Marshal Muir had been friends having served together as fellow law men for years. Marshal Muir appointed Harold Warren as a deputy when Muir became the Marshal in 1981. Nevertheless bad blood developed between the two men. On the fateful day of February 13, 1983, Marshal Muir asked Deputy Warren to accompany him in an attempt to arrest fugitive Gordon Kahl. Deputy Warren refused to go.

Deputy Marshal Warren was subpoenaed as a defense witness during the Faul-Kahl trial. During direct examination he volunteered that Marshal Muir had been told by the Marshals Service in Washington to make no further attempt to serve the Kahl fugitive arrest warrant. This testimony was an inaccurate account of the Washington headquarters Marshal Service's directions and was also a matter about which Mr. Warren had no personal knowledge.

In direct response to the question while my trial team and I were upset with Mr. Warren's seemingly obvious willingness to vilify the deceased Marshal, we did nothing to affect Mr. Warren's employment. I made no recommendation that he be transferred or fired.

QUESTION FOR MR. WEBB ON ADHERENCE TO PROSECUTION POLICY AND ACCURACY OF REPRESENTATIONS TO WITNESSES AND COURTS

The Committee has received several allegations concerning your activities as United States Attorney.

It has been alleged that, in the case of United States v. Zajac, your office failed to carry out its "open file" policy on discovery by the defense. Please describe your office's policy on discovery by the defense in criminal cases, and how you ensure compliance with that policy throughout the United States Attorney's office.

It has been alleged that in certain instances, your office has been less than accurate in its representations to witnesses before a grand jury and to the United States District Court. Specifically, it is alleged that in one instance, you told two prisoners who had been subpoenaed before a grand jury in Bismarck, North Dakota that at least two other prisoners had testified before a grand jury, when, in fact, these prisoners had refused to testify on Fifth Amendment grounds.

It has been alleged that in a recently concluded case before the United States District Court in Bismarck, North Dakota, you applied to the Court for an immunity order, based on the representation that the witness you sought to immunize had asserted his Fifth Amendment rights under oath, when, in fact, the witness had not done so.

Please describe the policy you have maintained in the office of the United States Attorney concerning the accuracy of representations to potential witnesses and to the United States District Court. What steps have you taken to ensure compliance with that policy throughout the office?

United States v. Zajac Matter:

Our office "open file" policy in criminal cases is offered on a case by case basis and announced at time of arraignment. Generally we follow "open file" policy in all cases unless witness protection matters or other considerations prevent prompt voluntary disclosure. The policy simply means that we voluntarily disclose matters directed by Rule 16, FED.R.CRIM.P. and 18 U.S.C § 3500 without the defense being required to file motions; further, it is our purpose by this policy to provide the materials to the defense as promptly as possible.

I am not specifically aware of defendant Zajac's claim but if we were in any way dilatory in providing information I can assure the committee that such an offense would not be purposeful and is exceptional. I ensure compliance with policies of my office by initially hiring a competent and trustworthy staff and secondarily by being attentive to comments or concerns of the Courts concerning my staff. I am immensely proud of my staff and I can report that the Courts before whom we practice have great respect for the office of the United States Attorney for the District of North Dakota. The last evaluation of our office by the United States Department of Justice was the highest rating which could be given a small size office.

It might also be noted that defendant Zajac recently brought a civil action against me and my First Assistant, Mr. Annear, as well as other public servants, whom he claimed had violated his constitutional rights as a result of the criminal prosecution. That civil case was dismissed on October 6, 1987, as being frivolous and without merit--the Court awarded $500 as Rule 11, FED.R.CIV.P. sanctions against Mr. Zajac.

Matters of Witnesses in Grand Jury:

I cannot determine what this question refers to. Mr. Metalitz indicated to me that the matter involved federal prisoner witnesses. I have discussed this matter with my staff and they cannot relate to this question either. Unfortunately I am unable to respond further to this question. As a matter of good practice, none of my assistants bootstraps testimony or knowingly misleads any prospective witness.

Matter of Immunized Witnesses:

This question undoubtedly refers to the criminal antitrust case United States v. McCormick recently tried in Bismarck, North Dakota. The case was prepared and presented by a trial team from the Antitrust Division of the Department of Justice from Chicago, Illinois. The trial team maintained liaison with me and my First Assistant, Mr. Annear, but our office did not participate in the preparation or trial of the case. The case preparation took several years and during this time the Antitrust team and our office staff did certainly develop a cordial rapport and mutual attitude of trust. At the request of the Antitrust trial team I signed several witness immunity requests pursuant to 18 U.S.C. § 6003 for both grand jury proceedings and trial court purposes. Each of these requests was made with the written approval of an Assistant Attorney General. It is now my understanding that one of the applications for grand jury witness immunity contained an incorrect assertion of fact. The motion indicates that the witness ". . . has refused, under oath, and is

likely to refuse to testify . . ." when the fact was that he had not testified. During the course of the trial, the Antitrust trial team explained to the Court that this mistake was the result of some improper form language which they have corrected. Substantively, it was explained to the Court that the witness's attorney, Mr. Tom Mulroy, member of the law firm of Jenner and Block, Chicago, had assured the Antitrust trial team that his client, the witness in question, would not testify without an immunity grant and would claim Fifth Amendment privilege. Attached and marked as exhibit is photocopy of Affidavit of Mary E. Jones.

Matter of Representations to Witnesses and United States Court:

The primary policy for maintaining the integrity of our representations to witnesses, the Courts and the public is to hire and maintain a top quality professional staff. We have a small staff of six (6) Assistant United States Attorneys but our combined years of practice exceeds 100. The staff is experienced having had extensive trial work including many complicated cases of substantial importance. The Department of Justice evaluation of our office was the highest which could be given a small office. I have been informed that my own recently completed ABA evaluation included high marks for integrity and fairness. The District Court Judges before whom we appear have never been critical of the integrity of me or my staff and have positively commented upon the competence and diligence of the office of United States Attorney for North Dakota.

I attempt to hire good people, to supervise my staff to the best of by ability and to set a good example for my staff. I am proud of the way in which our office has performed during the past six plus years of my tenure. Compliance with any policy can best be measured with hindsight: I believe our office measures up well.

AFFIDAVIT OF MARY E. JONES

Mary E. Jones, being duly sworn, hereby states:

1. I have been Assistant Chief of the Chicago Office of the Antitrust Division, United States Department of Justice, since May, 1984 until the present. My duties and responsibilities include supervision of all matters and investigations conducted by the Chicago Office and included the supervision of the investigation by the North Dakota Grand Jury of allegations of bid rigging on street and highway projects let within the State of North Dakota. The Chicago Office assisted the Grand Jury in this investigation which began in late 1984 and resulted in an indictment returned on October 9, 1985.

2. During the course of the North Dakota Grand Jury investigation, I and the attorneys conducting the investigation determined that, based upon a proffer of testimony, the testimony of William Collins III would be in the public interest.

3. Mr. Collins' attorney, Thomas R. Mulroy of Jenner & Block in Chicago, Illinois, represented to Barry Kaplan, an attorney working on the investigation, that Mr. Collins would assert his Fifth Amendment privilege and refuse to testify before the grand jury unless compelled to do so under 18 U.S.C., Section 6001, et seq. Based upon information and belief, Mr. Mulroy made this representation on or about February 4, 1985.

4. The attorneys conducting the investigation obtained in a letter the approval of the Acting Assistant Attorney General in charge of the Antitrust Division for the Government's Motion To Compel Testimony of William Collins III; submitted the motion for signature of Rodney Webb, the United States Attorney for the District of North Dakota; and filed the motion, letter and a proposed order on February 13, 1985. The order was entered that day. Mr. Collins testified pursuant to the order at the next regularly scheduled grand jury session on March 18, 1985.

5. Because the Grand Jury used the only courtroom in Fargo, the Judge was customarily sitting in another city in North Dakota at the time of the grand jury session. Thus, the motion and order were submitted prior to the appearance of the witness so that the order would be available for use on the date of the witness' testimony.

6. The Motion To Compel Testimony of William Collins III followed a format consistently used by the Chicago Office of the Antitrust Division at the time it was submitted to Mr. Webb for signature. The representations in the motion were based on information obtained by the attorneys conducting the investigation prior to the date of the motion, including the representation from Mr. Mulroy that William Collins III would refuse to testify before the grand jury unless compelled to do so by court order.

TOTAL P.04

I declare under penalty of perjury that the foregoing is true and correct.

Executed November 4, 1987.

Mary E. Jones

MARY E. JONES
Assistant Chief, Chicago Field Office
U.S. Department of Justice
Antitrust Division

Subscribed & sworn to before me,
this 4th day of November, 1987.

Margaret Mary Horgan

AFFIDAVIT

I, RODNEY S. WEBB, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Dated: November 4, 1987

RODNEY S. WEBB

Subscribed and sworn to before me this 4th day of November, 1987, at Fargo, North Dakota.

JENELL NILLES, Notary Public
Cass County, North Dakota
My Commission Expires: 10/26/90

Senator HEFLIN. Thank you very much. This concludes the hearing.

[Whereupon, at 11:19 a.m., the committee adjourned subject to the call of the Chair.]

RECEIVED JUL 0 8 1987

AMERICAN BAR ASSOCIATION

Standing Committee on
Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 Eye Street, N.W.
Washington, DC 20006

BOARD OF GOVERNORS
LIAISON
Sharp Whitmore
2005 Gird Road
Fallbrook, CA 92028

STAFF DIRECTOR
Wayland L. Sandel, Jr.
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5685

STAFF ASSISTANT
Diane Livingston
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5701

July 6, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: CLARENCE A. BEAM
United States Court of Appeals
for the Eighth Circuit

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Clarence A. Beam for appointment as Judge of the United States Court of Appeals for the Eighth Circuit.

Our Committee is unanimously of the opinion that Judge Beam is "Well Qualified" for this appointment.

Sincerely,

Robert B. Fiske, Jr.

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members

CLARENCE A. BEAM

Birth:	January 14, 1930	Stapleton, Nebraska
Legal Residence:	Nebraska	
Marital Status:	Married	Betty Fletcher Beam 5 children
Education:	1947 - 1951	University of Nebraska-Lincoln B.S. degree
	1953 - 1954 1963 - 1965	University of Nebraska-Lincoln J.D. degree
Bar:	1965	Nebraska
Military Service:	1951 - 1953(active) 1953 - 1964(reserve)	United State Army Captain
Experience:	1965 - 1968	Chambers, Holland & Dudgeon Associate
	1968 - 1971	Chambers, Holland, Dudgeon & Beam Partner
	1971 - 1979	Knudsen, Berkheimer, Endacott & Beam Partner
	1979 - 1982	Kundsen, Berkheimer, Beam, Richardson & Endacott Partner
	1982 - present	United States District Judge District of Nebraska
Office:	P.O. Box 1297, DTS Omaha, Nebraska 68101 402 221-3615	

To be United States Circuit Judge for the Eighth Circuit

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

ANSWER TO QUESTION 1:

Clarence Arlen Beam

2. Address: List current place of residence and office address(es).

ANSWER TO QUESTION 2:

Residence: 1425 North 102nd Avenue
Omaha, Nebraska 68114

Office: P.O. Box 1297, DTS
Omaha, Nebraska 68101

3. Date and place of birth.

ANSWER TO QUESTION 3:

January 14, 1930
Stapleton, Nebraska

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

ANSWER TO QUESTION 4:

Married to Betty L. (Fletcher) Beam
Spouse's occupation: Housewife
Address: 1425 North 102nd Avenue, Omaha, Nebraska 68114

5. Education: List each college and law school you have attended, including dates of attendance, degrees received and dates degrees were granted.

ANSWER TO QUESTION 5:

University of Nebraska - Lincoln
(College of Agriculture)
September, 1947 to June, 1951

Bachelor of Science Degree in Agriculture received in June, 1951.

University of Nebraska - Lincoln
(College of Law)
September, 1953 to June, 1954
September, 1963 to June, 1965

Juris Doctor Degree received in June, 1965.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

ANSWER TO QUESTION 6:

The Nebraska Farmer (magazine), Lincoln, Nebraska -- 1951

Lincoln News Agency, Lincoln, Nebraska (part-time during law school) -- 1953-1954

Steckley Hybrid Corn Company, Lincoln, Nebraska -- 1954-1963

The Carroll Company, Lincoln, Nebraska (part-time during law school) 1963

Beam and Associates, Lincoln, Nebraska (part-time during law school) 1964

Chambers, Holland & Dudgeon (Chambers, Holland, Dudgeon & Beam), Lincoln, Nebraska -- 1965-1971

U.S. House of Representatives, Lincoln, Nebraska (part-time) -- 1971-1973

Knudsen, Berkheimer, Endacott & Beam (Knudsen, Berkheimer, Beam, Richardson & Endacott), Lincoln, Nebraska -- 1971-1982

United States District Judge, Omaha, Nebraska -- 1982 to date

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

ANSWER TO QUESTION 7:

Yes. United States Army -- June 4, 1951 to March 27, 1964
USAR (Active Duty: October, 1951 - August, 1953)
Rank: Captain
Serial Number: 02103221
Present Status: Honorable Discharge

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

ANSWER TO QUESTION 8:

Regents Scholarship, University of Nebraska - Lincoln
Roscoe Pound Scholarship, University of Nebraska - Lincoln (College of Law)

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

ANSWER TO QUESTION 9:

American Bar Association -- 1965 to present

Nebraska State Bar Association -- 1965 to present

Lincoln (Nebraska) Bar Association -- 1965 to 1982

Omaha (Nebraska) Bar Association -- 1982 to present

Committee on Inquiry (Discipline) of the Nebraska Supreme Court, Third Judicial District (Appointed by the Nebraska Supreme Court) -- 1974 to 1982

Commissioner of the National Conference of Commissioners on Uniform State Laws -- 1979 to present
Nebraska Chairman -- 1980 to 1982
Present Committees:
Chairman, Drafting (Standby) Committee on Uniform Rules of Evidence
Certification of Questions of Law Act

Defense Counsel Association of Nebraska (Civil) -- 1970 to 1982 (Vice President)

National Lawyers Club, Inc., Washington, D.C.

Delta Theta Phi Law Fraternity

Chairman, Chief Judges' Meeting, Chief Judges of the Eighth Circuit, December 5-6, 1986, Scottsdale, Arizona

Member and Nebraska division chairman, Historical Society of the United States Courts in the Eighth Circuit, 1985 to 1986

Member, Judicial Council of the United States Court of Appeals for the Eighth Circuit, 1985 to 1987

Committees: District Court Committee, Magistrates Committee, Committee on the Operation of the Jury System and Executive Committee

Chairman, Judicial Council Committee to adopt Circuit Rules on Complaints of Judicial Misconduct or Disability, 1987 to present.

Panel member, Suggestions for Improving Practice in the Federal Courts, Federal Practice Seminar, August 27, 1982

Lecturer, The Pretrial Conference, Federal Practice Seminar, August 26, 1983

Lecturer, 1983 Amendments to the Federal Rules of Civil Procedure, Federal Practice Seminar, August 17, 1984

Lecturer, Effective Courtroom Communication, Nebraska Association of Trial Attorneys, October 4, 1985

Lecturer, Seminar on Jury Utilization and Management, Boulder, Colorado, April 30 - May 2, 1986

Lecturer, The Sentencing Judge Discusses Sentencing, Federal Practice Seminar, November 14, 1986

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organization to which you belong (such as civic, educational "public interest" law, etc.).

ANSWER TO QUESTION 10:

(a) Organizations which lobby before public bodies:

American Bar Association
Nebraska State Bar Association

Other present memberships:

American Legion Post Number 3, Lincoln, Nebraska
Kiwanis Club of Omaha, Inc., Omaha, Nebraska
Masonic organizations, Lincoln, Nebraska
North Star Lodge Number 227, A.F. & A.M.
Scottish Rite
Sesostris Shrine Temple
The Omaha Club, Omaha, Nebraska
The Omaha Press Club, Omaha, Nebraska
University of Nebraska Foundation, Lincoln, Nebraska
(Law College Library Fund), Lincoln, Nebraska
The Newcomen Society in North America,
Exton, Pennsylvania

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

ANSWER TO QUESTION 11:

The United State Supreme Court -- Admitted January 13, 1975
The Supreme Court of the State of Nebraska -- Admitted June 28, 1965
The United States Court of Appeals for the Eighth Circuit -- Admitted June 3, 1976
The United States District Court for the District of Nebraska -- Admitted June 28, 1965
The United States Tax Court -- Admitted September 18, 1979

I have also been admitted on a case-by-case basis in the United States District Court for the District of Montana, the United States District Court for the District of South Dakota and the United States District Court for the District of Central Illinois.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

ANSWER TO QUESTION 12:

Article, "Chief Judge Harvey Johnson -- A Prophet with Honor" to be published in the fall 1987 issue of Creighton University Law Review

13. Health: What is the present state of your health? List the date of your last physical examination.

ANSWER TO QUESTION 13:

Excellent.
February 27, 1987

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

ANSWER TO QUESTION 14:

I am now Chief Judge of the United States District Court for the District of Nebraska. I took the oath of office as a District Judge on January 8, 1982. I became Chief Judge on January 7, 1986.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

ANSWER TO QUESTION 15(1):

Since there are many important opinions written each year, it is difficult to select ten to be classified as "most significant." Therefore, I have selected, in part, cases which also illustrate the variety of issues dealt with in the District of Nebraska.

a. Mutual of Omaha Insurance Co. v. Novak, 648 F. Supp. 905 (D. Neb. 1986) (this case is now on appeal)

b. Chambers v. Omaha Girls Club, 629 F. Supp. 925 (D. Neb. 1986) (this case is now on appeal)

c. Bear v. United States, 611 F. Supp. 589 (D. Neb. 1985), aff'd, 810 F.2d 153 (8th Cir. 1987)

d. Miers v. Central Mine Equipment Co., 604 F. Supp. 502 (D. Neb. 1985), followed by Peterson v. Fuller Co., 807 F.2d 151, 153 (8th Cir. 1986)

e. United States v. Van Horn, 579 F. Supp. 804 (D. Neb. 1984), aff'd sub nom., United States v. Womochil, 778 F.2d 1311 (8th Cir. 1985)

f. Petznick v. United States, 575 F. Supp. 698 (D. Neb. 1983) (this case was not appealed)

g. Associated Grocers of Nebraska Cooperative Inc. v. American Home Products Corp. (In re Associated Grocers of Nebraska Cooperative Inc.), 62 B.R. 439 (D. Neb. 1986), appeal dismissed, No. 86-2210 (8th Cir. Jan. 26, 1987)

h. County of Hennepin v. AFG Industries, Inc., 726 F.2d 149 (8th Cir. 1984)

i. Omaha Symphony Ass'n v. Omaha Musicians Ass'n, CV 81-0-413 (D. Neb. May 5, 1982) (this case was not appealed)

j. In re Hansen, 60 B.R. 359 (D. Neb. 1982), appeal dismissed, 702 F.2d 728 (8th Cir.), cert. denied sub nom., First National Bank v. Hansen, 463 U.S. 1208 (1983)

ANSWER TO QUESTION 15(2):

Two of the reversals, In re Olson, 730 F.2d 1109 (8th Cir. 1984), and In re Bestmann, 720 F.2d 484 (8th Cir. 1983), arose in cases where the issue on appeal was whether an order of the Bankruptcy Court was final or interlocutory. In my decisions, I found the orders to be interlocutory and remanded the actions to the Bankruptcy Court for further proceedings. In doing so, I relied upon an unpublished opinion of the United States Court of Appeals for the Eighth Circuit, Ewald v. Cornelius Co., No. 82-1566 (8th Cir. Nov. 24, 1982), in which the Court appeared to say that Bankruptcy Court orders are interlocutory unless they "dispose of the entire cause." Without overruling Ewald, the Court applied a modified rule of finality in Bestmann. Then, on the same day the Circuit opinion in Olson was issued, the Court expressly overruled Ewald through In re Leimer, 724 F.2d 744, 745 (8th Cir. 1984), and set forth a new test for determining the finality of an order of the Bankruptcy Court.

Four of the reversals involved social security appeals. The initial decisions were made by an Administrative Law Judge (ALJ). An appeal lodged with the District Court is usually considered on the record made before the ALJ. In these four cases I affirmed an action of the ALJ. The Circuit Court disagreed with the decisions. This area of the law has apparently been very troublesome for many District Judges. Judge Gerald W. Heaney, one of the Judges of the Eighth Circuit, authored an article found at 7 Hamline L. Rev. 1 (1984) entitled "Why the High Rate of Reversals in Social Security Disability Cases." Judge Heaney states that "Last year (presumably 1983) the Court of Appeals for the Eighth Circuit reversed approximately sixty percent of the social security cases brought to it on appeal. Given that the normal reversal rate is only sixteen to nineteen percent, this statistic is even more startling." Id. at 10. The recent case, Bowen v. Yuckert, 107 S. Ct. 2287 (1987), seems to indicate that the Circuit Courts may have been in error in some of the reversals in this area of the law.

In Coleman v. City of Omaha, 714 F.2d 804 (8th Cir. 1983), I was affirmed on every substantive matter. However, I had affirmed the disallowance by the Clerk of Court of an expert witness fee in excess of the amount provided for in 28 U.S.C. § 1821(b). The Circuit Court disapproved of this ruling and remanded the matter for consideration of the taxation of the expert's total fee as part of the bill of costs. The recent case, Crawford Fitting Co. v. J. T. Gibbons, Inc., 55 U.S.L.W. 4820, (U.S. June 15, 1987), appears to support my original conclusion.

In Tusa v. Omaha Auto Auction Inc., 712 F.2d 1248 (8th Cir. 1983), I was affirmed on every substantive matter. However, the Circuit Court felt that I had awarded approximately $3,000.00 more in attorney fees to the successful party than was proper. This was a civil action involving damages arising from the fraudulent roll back of an odometer prior to the sale of an automobile. The statute provides for attorney fees for a prevailing party. A fee of $27,000.00 was requested and was supported by the affidavits submitted. I evaluated the request pursuant to Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), a case approved by the Eighth Circuit, and I reduced the request to approximately $11,500.00. Since the damages were small, as they are in almost all of these cases, the Circuit Court, attaching more importance to the amount of the award, reduced the fee to $8,000.00.

In Loper v. Dean Witter Reynolds, No. 85-1828 and 85-1938 (8th Cir. Aug. 13, 1986), I denied, in reliance upon Wilko v. Swan, 346 U.S. 427 (1953), and Surman v. Merrill Lynch, Pierce, Fenner and Smith, 733 F.2d 59 (8th Cir. 1984), a motion to compel arbitration of a claim arising under Section 10(b) of the Securities Exchange Act of 1934. After this order and prior to the ruling on appeal, the Eighth Circuit, in Phillips v. Merrill Lynch, Pierce, Fenner & Smith, 795 F.2d 1393 (8th Cir. 1986), decided that arbitration is mandatory and in so doing determined that Surman did not apply to the facts of this action. The Eighth Circuit acknowledged that its decision in Phillips placed it at odds with the Second Circuit and a number of other courts. See McMahon v. Shearson/American Express Inc., 788 F.2d 94, 98 (2d Cir. 1986). However, the United States Supreme Court recently reached the same conclusion as the Eighth Circuit. See Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987).

In United States v. Haney, 711 F.2d 113 (8th Cir. 1983), I did not give the defendant credit on his sentence for time served in state custody. I applied United States v. Shillingford, 586 F.2d 372, 375 (5th Cir. 1978), and placed the burden on the defendant to show that his continued confinement by the state was exclusively the result of the federal detainer involved. The Eighth Circuit had not then decided the matter insofar as I could determine. In this case, the Eighth Circuit rejected the Shillingford rule and placed the burden upon the government to establish that Mr. Haney could not have obtained pre-trial release from state custody. Thus, my ruling was reversed.

In Kasick v. Block, 717 F.2d 459 (8th Cir. 1983), cert. denied, 465 U.S. 1067 (1984), I found that the Secretary of Agriculture was arbitrary and capricious in applying the rules of the Payment-in-Kind (PIK) agricultural feed grain program. The Secretary had included "white" corn acreage and

"seed" corn acreage within the ambit of the program but refused to allow PIK payments to "popcorn" producers. The evidence established that white corn is grown primarily for human food with excess production being diverted to animal feed. Excess untreated seed corn is diverted to animal feed. Popcorn is also raised for human consumption with unused amounts being diverted to poultry feed. It was my opinion that, under the facts adduced, it was arbitrary for the Secretary to exclude popcorn acreage from this program. The Circuit Court disagreed with me.

Rollins v. Farmer, 731 F.2d 533 (8th Cir. 1984), was a civil rights action against John R. Farmer, an Omaha Police Officer, and the City of Omaha. The final pre-trial order indicated that the alleged acts of Officer Farmer were carried out in his "official" capacity. Based upon this understanding, I directed a verdict for both defendants at the close of the plaintiff's case. Thereafter, plaintiff discharged his trial attorney and retained another attorney who contended, on appeal, that reference to the "good faith" of Officer Farmer contained in defendant Farmer's pleadings and in defendant Farmer's contested issues in the pre-trial order could be construed to mean that Officer Farmer was also sued in his "individual" capacity. The Circuit Court agreed that the defendant's allegations could be construed to raise individual capacity issues and remanded the matter for a trial on this limited issue, affirming me in all other respects. It should be repeated that the language relied upon by the Circuit Court was language in the superceded pleadings and in the pre-trial order placed there by defendant Farmer and not by the plaintiff who, on appeal, asserted the "individual capacity" claim. At a subsequent trial to a jury on this issue, the jury returned a verdict for Officer Farmer.

In Givens v. A.H. Robins Co., Inc., 751 F.2d 261 (8th Cir. 1984), I dismissed the action because plaintiff's attorney failed to comply with certain orders of the Court on discovery, briefing and other conduct. The dismissal order was also based upon issues of law concerning a Nebraska statute of limitations. A few weeks after my order, the Nebraska Supreme Court, in another case, ruled upon the legal issue in a manner which was favorable to plaintiff's position. Based upon this ruling and in part upon allegations placed in the file after my initial order of dismissal was entered, the Circuit remanded the action for further proceedings. The parties then settled and dismissed the action without further involvement of the Court.

Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Hroch, 757 F.2d 184 (8th Cir. 1985), was an action originally tried by my predecessor, the Honorable Robert V. Denney. His decision for the defendant was reversed and the action was remanded to me for trial. Although the plaintiffs

alleged theories of specific performance and damages, they offered evidence on and sought damages for breach of contract at the trial. I held for the defendant. The Circuit Court ruled that I had held the plaintiffs to a more exacting standard of proof than was necessary and directed that I order an accounting, under the specific performance theory, through examination by a certified public accountant of available and reconstructed business records.

In Jorgensen v. Modern Woodmen, 761 F.2d 502 (8th Cir. 1985), after hearing and viewing the witnesses and considering the other evidence presented at trial, I concluded that Mr. Jorgensen had suffered age discrimination in employment in violation of 29 U.S.C. §§ 621 et seq. The Circuit panel examined a transcript of the testimony and the exhibits received at the trial and disagreed with me.

Rosen-Novak Auto Co. v. Honz, 783 F.2d 739 (8th Cir. 1986), was an appeal from the Bankruptcy Court to the District Court. The Bankruptcy Court had dismissed Rosen-Novak's claim for insurance benefits for employees lodged against Blue Cross/Blue Shield. The matter was presented to the Bankruptcy Court upon a joint stipulation of fact. It was my understanding that all material facts relevant to the dispute were contained in the joint stipulation of fact. After I ruled that Blue Cross/Blue Shield was liable under its policy, based upon the joint stipulation of fact, the insurance carrier appealed and contended that I should have remanded the matter to the Bankruptcy Court for further evidence. Upon remand from the Circuit I returned the case to the Bankruptcy Court. I am now informed that the matter was then settled, without further evidence or other proceedings, on substantially the same basis as under my order.

Griffin v. City of Omaha, 785 F.2d 620 (8th Cir. 1986), was a civil rights action tried to the Court. After trial, I concluded that the plaintiffs were discharged because of failure to successfully complete firearms training in a police recruit class and not because of race or sex discrimination. A panel of the Circuit disagreed with my conclusions of fact. This action by the Circuit was problematic, in my view, because the factual conclusions reached by the panel did not appear to be supported by the record or, in the alternative, were clearly in dispute under the evidence presented at trial.

In Consolidated Blenders, Inc. v. United States, 785 F.2d 259 (8th Cir. 1986), I was presented with a very difficult issue concerning net-operating-loss carryovers and investment tax credit carrybacks belonging to eight corporations which were merged into plaintiff corporation. I determined that the Internal Revenue Service regulation, limiting the tax credit carryovers, was invalid because it violated the intent of

Congress under the statute. I relied, in part, on World Service Life Insurance Co. v. United States, 471 F.2d 247 (8th Cir. 1973), an Eighth Circuit case which had earlier invalidated another part of the same regulation. The Circuit Court found, however, that this particular portion of the regulation was supportable under the Act.

Actors Equity Association v. American Dinner Theatre Institute, 802 F.2d 1038 (8th Cir. 1986), was an action to compel arbitration under a collective bargaining agreement. The defendants contended that the right to arbitration was limited under the agreement and was illegal under Nebraska law. I ordered arbitration, which ruling was not appealed. I awarded attorney fees under the rationale found in Lackawanna Leather Co. v. United Food & Commercial Workers International Union, 706 F.2d 228 (8th Cir. 1983). The Circuit Court found that the defendants' arguments for resisting arbitration were "concededly novel" but, apparently, not frivolous and in bad faith. Thus, the fee award was disallowed.

Walsh v. Union Pacific Railroad Co., 803 F.2d 412 (8th Cir. 1986), cert. denied, ___ S. Ct. ___ (June 15, 1987), was an action in which I set aside part of a labor arbitrator's award because it "fail[ed] to draw its essence from the collective bargaining agreement." In this regard, plaintiff Walsh was reinstated to her job by the arbitrator but was denied back pay. In a split decision, a Circuit panel ruled that the arbitrator's award was within the scope of the collective bargaining agreement and disallowed the back pay. The dissenting Circuit Judge found my ruling to have been correct.

ANSWER TO QUESTION 15(3):

Mutual of Omaha Insurance Co. v. Novak, 648 F. Supp. 905 (D. Neb. 1986). This case is presently on appeal.

In this case, Mutual of Omaha, an internationally known insurance company, sought to enjoin a purported trade mark infringement. The defendant, an anti-nuclear activist, created and began to sell t-shirts, sweatshirts, caps, buttons and coffee mugs, bearing designs patterned after the Mutual of Omaha trademarks including the war-bonneted head which is a part of the mark. Questions of parody, satire, and trademark disparagement were raised by the litigation. However, one of the most significant issues involved the tension between the First Amendment right of political comment and trademark rights.

Munnelly v. United States Postal Service, 614 F. Supp. 519 (1985), aff'd, 805 F.2d 295 (8th Cir. 1986).

In this matter, the United States Postal Service had discharged Mr. Munnelly, a postmaster. One of the many issues involved the interplay, if any, between Article I of the Constitution of the United States and the Postal Reorganization Act of 1970.

United States v. Van Horn, 579 F. Supp. 804 (D. Neb. 1984), aff'd sub nom., United States v. Womochil, 778 F.2d 1311 (8th Cir. 1985).

This criminal case involved numerous issues concerning the validity of wire taps and other intercepted communications. As such, it required a number of Fourth Amendment and statutory considerations.

Associated Grocers of Nebraska Cooperative Inc. v. American Home Products Corp. (In re Associated Grocers of Nebraska Cooperative Inc.), 62 B.R. 439 (D. Neb. 1986), appeal dismissed, No. 86-2210 (8th Cir. Jan. 26, 1987).

This action involved, in part, a question of the constitutionality of part of the Federal Bankruptcy Act. The Bankruptcy Court ruled that it could not exercise jurisdiction over certain claims without violating Article III of the United States Constitution. The matter reached this Court on appeal from this ruling in the Bankruptcy Court. The United States and others were granted leave to intervene in support of constitutionality. This case presented, I believe, the first instance in which this particular constitutional issue was submitted for decision. I held that Article III was not violated by the plan Congress had enacted granting the Bankruptcy Court the power under 28 U.S.C. § 157(b)(2)(F) to avoid preference transfers under 11 U.S.C. §§ 547(b) and 549(a).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

ANSWER TO QUESTION 16:

For approximately four years, I was an appointed member of the Charter Revision Commission of the City of Lincoln, Nebraska, an unpaid, part-time commission required by the Charter of the City of Lincoln.

I have not been a candidate for elective office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

ANSWER TO QUESTION a(1):

No.

2. whether you practiced alone, and if so, the addresses and the dates.

ANSWER TO QUESTION a(2):

No.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

ANSWER TO QUESTION a(3):

i. Chambers, Holland & Dudgeon
850 Stuart Building
Lincoln, Nebraska 68508
1965 to 1968 -- Associate

ii. Chambers, Holland, Dudgeon & Beam
850 Stuart Building
Lincoln, Nebraska 68508
1968 to 1971 -- Partner

iii. Knudsen, Berkheimer, Endacott & Beam
1000 NBC Center
Lincoln, Nebraska 68508
1971 to 1979 -- Partner

iv. Knudsen, Berkheimer, Beam, Richardson & Endacott
1000 NBC Center
Lincoln, Nebraska 68508
1979 to 1982 -- Partner

The firms of Mason, Knudsen, Berkheimer & Endacott and Chambers, Holland, Dudgeon & Beam were merged in 1971 to form the partnership indicated in "iii" above. Upon the withdrawal of Donald E. Endacott in 1979 to become a District Judge for the Third Judicial District of Nebraska, the firm name was changed as indicated in "iv" above.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character changed over the years.

ANSWER TO QUESTION b(1):

My law practice was predominantly a general civil trial practice although I also handled probate, real estate, corporate, banking, business and legislative matters. During the last seven years of my practice, I prepared and tried a large number of product liability actions.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

ANSWER TO QUESTION b(2):

My typical clients included railroads, casualty insurance carriers and their insureds, livestock feed manufacturers, banks, major corporations, small businesses and individuals.

In Nebraska, during my years of practice, you could not hold yourself out as a specialist. However, my firm attempted to allow for a measure of specialization as the volume of similar cases would allow. Accordingly, from 1974 to 1982, agricultural product liability litigation occupied a greater part of my time than any other type of case.

c. 1. Did you appear in court frequently, occasionally or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

ANSWER TO QUESTION c(1):

Frequently

2. What percentage of these appearances was in:
   a) Federal courts;
   b) State courts of record;
   c) Other courts.

ANSWER TO QUESTION c(2):

Federal courts -- approximately 40 percent
State courts of record -- approximately 35 percent
Other courts (including administrative agencies with judicial authority) -- approximately 25 percent

3. What percentage of your litigation was:
   a) Civil;
   b) Criminal.

ANSWER TO QUESTION c(3):

Civil -- 95 percent
Criminal -- 5 percent

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

ANSWER TO QUESTION c(4):

Approximately 150 cases (approximately 75 as co-counsel and approximately 75 as sole or chief counsel).

5. What percentage of these trials was:
   a) Jury.
   b) Non-jury.

ANSWER TO QUESTION c(5):

Jury -- 35 percent
Non-jury -- 65 percent

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

ANSWER TO QUESTION 18:

(a) Roland Dobson, Reginald Dobson and Seth Dobson d/b/a Dobson Brothers Farm, Plaintiffs, v. W. R. Grace & Co., Defendant and Third-Party Plaintiff v. Interstate Industries Inc., Interstate Chemical Products Inc., and West Chemical Products, Inc., Third-Party Defendants.

This was civil case number 1345 in the United States District Court for the District of Nebraska.

This was a product liability action involving allegedly defective livestock feed. The plaintiffs' alleged that a large number of cattle were killed or damaged as a

result of the alleged defect. The defendant instituted a third-party claim against the supplier or suppliers of the allegedly defective ingredient.

The significance of the case is found in the nature and amount of expert evidence adduced by all parties and the large number of difficult evidentiary questions. The matter was tried to a jury from March 15 through April 2, 1971, resulting in a jury verdict for my client. United States District Judge Robert Van Pelt presided. Richard Williams, 1530 South 70th Street, Suite 202, Lincoln, Nebraska 68506, telephone (402) 483-4736) and Richard P. Nelson, 1560 South 70th Street, Lincoln, Nebraska 68506, telephone (402) 488-0985 were counsel for the plaintiffs. Fredric H. Kauffman, Suite 1900, FirsTier Bank Building, Lincoln, Nebraska 68508, telephone (402) 474-6900 and Donald R. Witt, Suite 1200, American Charter Center, 206 South 13th Street, Lincoln, Nebraska 68508, telephone (402) 475-1075 represented the third-party defendants. I was sole counsel for the defendant, W. R. Grace & Co.

(b) Denver Midwest Motor Freight, Inc. Plaintiff v. Busboom Trucking Inc., Defendant.

This was a case in the District Court of Gage County, Nebraska, and may be found at Docket 60, Page 60. On appeal this was case number 38745 in the Supreme Court of the State of Nebraska, reported at 190 Neb. 231, 207 N.W.2d 368 (1973).

This was an action by plaintiff, lessor, to recover damages from defendant, lessee, under an indemnification clause contained in a truck trip lease. I was retained by the insurance carrier of the lessee to defend the matter. Theodore Kessner, 400 Lincoln Benefit Building, Lincoln, Nebraska 68508, telephone (402) 475-5131 was personal counsel for the lessee. Bernard Packett, 2115 State Capitol, Lincoln, Nebraska 68509, telephone (402) 471-2682, represented the plaintiff.

The matter was significant because the lease indemnity clause in question was widely used in the trucking industry and was important to the operating procedures used at that time. It was our contention that the clause was void and unenforceable because it was contrary to Interstate Commerce Commission regulations and in violation of established public policy. This was a case of first impression in Nebraska. On April 25, 1972, after hearing, the trial court agreed with our position and sustained a demurrer to the amended petition for relief. On June 14, 1972, the trial court sustained a demurrer to the second amended petition. The case was dismissed by the Court on August 7, 1972.

On August 17, 1972, a motion for new trial by plaintiff was overruled and an appeal was taken to the Supreme Court of the State of Nebraska.

The Nebraska Supreme Court sustained the ruling of the trial court and rendered the indemnity clause ineffective in Nebraska.

(c) The Farmers State Bank of Aurora, Nebraska, Plaintiff, v. The Edison Non-Stock Cooperative Association, Defendant and Third-Party Plaintiff, v. Dick J. Nelson, Third-Party Defendant.

This was a case in the District Court of Furnas County, Nebraska, case number 7177. On appeal, this was case number 39013 in the Supreme Court of the State of Nebraska and is reported at 190 Neb. 789, 212 N.W.2d 625 (1973).

This was a case in which the third-party defendant, functioning pursuant to a previous course of dealing, sold grain in which the plaintiff had a valid security interest. After the suit was initiated, I was retained by the Bank's regular counsel to amend the pleadings and prepare the matter for trial. The case was tried to a jury December 18 through 22, 1972, with District Judge Jack Hendrix presiding. At the conclusion of all the evidence, the Court sustained plaintiff's motion for a directed verdict. The significance of the case was that it determined the legal relationships under the Nebraska Uniform Commercial Code between a farm lender and the vendee of farm products. It also clearly defined the requirements of waiver of a secured interest under Nebraska law. This case represented the law of Nebraska until March 20, 1987, when the Nebraska Supreme Court in Farmers State Bank v. Farmland Foods, Inc. 225 Neb. 1, 402 N.W.2d 277 (1987), modified the rule in a four to three decision. William H. Sherwood, 325 Ogden Avenue, Oxford, Nebraska 68967, telephone (308) 824-3231 was lead counsel for the defendant along with Robert L. Poff, Suite 800, 213 South Jefferson Street, Roanoke, Virginia 24011, his associate counsel. The third-party defendant was unrepresented. I was lead trial counsel for the plaintiff and was assisted by Larry G. Carstenson, 1218 "L" Street, Aurora, Nebraska 68818, telephone (402) 694-6907, regular counsel for the plaintiff.

(d) The Interstate Commerce Commission and Nebraska Public Service Commission, Plaintiffs v. The Chicago Rock Island and Pacific Railroad Company, Defendant.

This was civil case number 73-L-244 in the United States District Court for the District of Nebraska. On appeal this was case number 73-1920 in the United States Court of Appeals for the Eighth Circuit reported at 501 F.2d 908 (8th Cir. 1974). Petition for Writ of Certiorari to the United States Supreme Court was denied at 402 U.S. 972 (1975).

The Interstate Commerce Commission and the Nebraska Public Service Commission alleged that the Chicago Rock Island & Pacific Railroad Company had improperly abandoned a 39-mile railway branch line in Nebraska by failing to maintain the route. The Railroad was in dire financial straits and was using its limited resources to repair mainline trackage because these routes had greater potential for producing revenues. After trial to Chief United States District Judge Warren K. Urbom on October 15 through 18, 1973, the Court agreed with the premise of defendant that the Interstate Commerce Commission had primary jurisdiction over the dispute and the Court refused to grant the plaintiffs' request for injunction against the purported abandonment of the Rock Island line. The Circuit Court reversed the District Court and ruled that the doctrine of primary jurisdiction did not apply. The Circuit Court, however, did not order the District Court to grant the injunction. The line was not reopened. A substitute truck transportation arrangement was employed to serve the shippers involved.

Since many American railroads were having financial difficulties, the case was significant on the issue of whether failure to maintain a railway line constituted improper abandonment.

The Interstate Commerce Commission was represented by Lawrence Chamblee whose address and telephone are presently unknown. The Nebraska Public Service Commission was represented by John Finnegan, 924 Twyckenham Drive North, South Bend, Indiana 46617, Daniel Wherry, Suite 203, 202 South 11th Street, Lincoln Federal Savings Building, Lincoln, Nebraska 68508, telephone (402) 474-1791, who was then the United States Attorney, was also counsel of record for the Interstate Commerce Commission but participated very little in the matter. I was counsel for the Chicago, Rock Island & Pacific Railroad Company along with Kenneth C. Stephan of my office who acted as my co-counsel.

(e) Robbins Brothers, Plaintiff v. Farmers Union Grain Terminal Association, Defendant.

This was civil case number 73-1014 in the United States District Court for the District of South Dakota, Northern Division. On appeal this was case number 76-1413 which is reported at 552 F.2d 788 (8th Cir. 1977).

This was a 22-day jury trial commencing on April 22, 1975, and concluding on May 27, 1975, presided over by Chief United States District Judge Fred J. Nichol. This was a vigorously contested product liability action with numerous evidentiary issues. The jury returned a verdict for the plaintiff. Another of significance was the ruling by the trial court that a changed label on the product constituted a subsequent remedial measure which was, nonetheless, admissible as substantive evidence of a defect under a theory of strict liability in tort. The Eighth Circuit Court of Appeals affirmed the trial court. Later decisions of the Eighth Circuit Court have eroded the strength of the Robbins opinion with regard to subsequent remedial measures taken under similar situations. Local counsel aided in jury selection. Otherwise, I was sole counsel for the defendant. Ross H. Oviatt and Ronald L. Schultz, whose addresses and telephone numbers are presently unknown, were co-counsel for the plaintiff.

(f) The Village of Doniphan, Nebraska, et al., Plaintiffs v. The Cities of Hastings, Nebraska, and Grand Island, Nebraska, Defendants (In re the application of Hastings and Grand Island to construct a coal-fired electric generation plant).

This was case number 2171 before the Nebraska Power Review Board, a state agency with quasi-judicial responsibilities for settling disputes involving the generation and transmission of electricity in Nebraska.

Hastings and Grand Island, cities with a population of 25,000 to 35,000 persons each, entered into an interlocal agreement for the purpose of developing, eventually, 1650 Megawatts of electrical generation capability within 800 yards of the corporate limits of the Village of Doniphan, a village of 700 persons. The location was within the extra territorial zoning jurisdiction of Doniphan.

The Village retained me to aid it in objecting to the location of the proposed facility. After a Power Review Board hearing, conducted pursuant to the Nebraska Rules of Evidence before a hearing officer and the Board, en banc, the permit to construct at the proposed

location was denied. The hearing was held on August 10, 11 and 12, and September 8, 9, 10, 11, 20, 21 and 22, 1976. I functioned as chief trial counsel for all objectors.

The matter was significant because it was, to our understanding, the first time since the creation of the Nebraska Power Review Board that a request to construct a generation facility was not approved. It was also significant because of the approach taken by the objectors. Since the Power Review Board did not have authority over sites for electric generation facilities, it was necessary for the objectors to establish that the cities could acquire sufficient electric power from an alternate source at less cost. The matter was also significant because it prompted the Nebraska Legislature to amend state statutes to provide protection for a village from the invasion of its zoning jurisdiction by other governmental subdivisions.

Chesley S. Baker, now deceased, represented some individual objectors. Steven D. Leininger, P.O. Box 790, Grand Island, Nebraska 68601, telephone (308) 382-1930, counsel for the Village of Doniphan participated in some pre-trial matters. Earl D. Ahlschwede, P.O. Box 452, Grand Island, Nebraska 68801, telephone (308) 384-0200, represented Hastings and Grand Island. Rick Reier, an associate of my firm assisted at the hearing.

(g) Horacek, et al., Plaintiffs v. Thone, Governor of Nebraska, et al., Defendants.

This was civil case number 72-L-299 in the United States District Court for the District of Nebraska.

In early 1979, I was retained by the Attorney General of Nebraska to represent, as co-counsel, the Governor of the State of Nebraska, the Director of the Nebraska Department of Public Institutions, the Director of the (State) Office of Mental Retardation and the Superintendent of the Beatrice (Nebraska) State Developmental Center who were defendants in litigation involving the rights of mentally retarded citizens to treatment in the least restrictive environment. Under the terms of a previously entered consent decree, a 43-page Alternate Plan of Implementation was developed and drafted. I functioned as trial co-counsel for the defendants at a trial before United States District

Judge Albert Schatz held February 9 through 19, 1981, for the purpose of determining which of two proposed plans should be adopted by the Court. The defendants' alternate plan was accepted by the Court.

The action was significant because of the constitutional issues involved and the multi-million dollar cost implications of the matter. Some of the issues in this matter were partially addressed in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), and Youngberg v. Romeo, 457 U.S. 307 (1982). Other active counsel of record in this matter were: Melvin Kammerlohr, Assistant Attorney General for the State of Nebraska, 2118 State Capitol, Lincoln, Nebraska 68509, telephone (402) 471-2682; Bruce Mason, Tower Plaza Building, Suite 301, 8420 West Dodge Road, Omaha, Nebraska 68114, telephone (402) 391-5400, counsel for the named plaintiffs and most class members; Richard D. McClain, 3705 South Street, Lincoln, Nebraska 68506, telephone (402) 489-1394, counsel for certain class members; J. Patrick Green, Creighton Law School, 2500 California Street, Omaha, Nebraska 68178, telephone (402) 280-2872, guardian ad litem; Robert D. Dinerstein, whose address and telephone are currently unknown, counsel for intervenor, United States of America.

(h) North Star Lodge No. 227, A.F. and A.M., et al., Appellants v. The City of Lincoln, et al., Appellees.

This was a case in the District Court of Lancaster County, Nebraska, and may be found at Docket 289, Page 118. On appeal, this was case number 44359 in the Supreme Court of the State of Nebraska reported at 212 Neb. 236, 322 N.W.2d 419 (1982).

This was a declaratory judgment action wherein the plaintiffs-appellants sought to invalidate the creation of a special improvement district and the taxes imposed upon property owners by the actions of the defendants-appellees. The trial court held for the City. On appeal, the Supreme Court reversed and declared the City action void. The case was significant because it analyzed the authority of state taxing entities to impose taxes on property owners for public improvements. This was a case of first impression in Nebraska with regard to the meaning of the term "assessable unit," a term sometimes used by the Nebraska Legislature but not previously defined. William F. Austin, City Attorney for the City of Lincoln, Nebraska, 555 South 10th Street, Room B-241, Lincoln, Nebraska 68508, telephone (402) 473-6286 represented the defendants. Robert J. Routh, a partner in my former firm completed this case for plaintiffs after I became a United States District Judge.

(i) - (n) Unigard Mutual Insurance Company, et al., Plaintiffs, v. Darrell Abbott, et al., Defendants. Pierce Packing Company, Plaintiff v. General Electric Company, et al., defendants. Ritewood, Inc., Plaintiff, v. Pierce Packing Company, Defendant and Third-Party Plaintiff, v. the United States of America, et al., Third-Party Defendant. Farmers Union Grain Terminal Association, Plaintiff, v. The United States of America, Defendant.

Case Numbers: CV 80-9A-BLG; CV 80-9B-BLG; CV 80-23-BLG; CV 80-105-BLG; CV 80-216-BLG; CV 80-116-BLG; in the United States District Court for the District of Montana.

In June or July of 1979, a coolant containing Polychlorinated Biphenyl (PCB) escaped from an electrical transformer in storage at Pierce Packing Company in Billings, Montana. PCB's are carcinogens which are banned from foodstuffs in concentrations in excess of those specified in rules promulgated by the Federal Food and Drug Administration.

The PCB's contaminated meatmeal and inedible tallows which were distributed as livestock feed ingredients over a six state area. As a result, damages estimated at 10 to 20 million dollars were asserted in the various actions referred to above.

Farmers Union Grain Terminal Association (GTA) of Minneapolis, Minnesota, was one of the major feed manufacturers who received contaminated meatmeal. In October of 1979, I was retained by GTA and its liability insurance carrier to represent them in this matter. We advised them on recall procedures, damage settlements, contribution and indemnification issues and represented them in all litigation.

The insurance carriers of Pierce Packing Company instituted an action in the Nature of Interpleader in the United States District Court for the District of Montana (CV 80-9A-BLG). Because of the number of claimants and counsel, Chief United States District Judge James F. Battin invoked, in part, the procedures and rules, where applicable, for complex and multi-district litigation. The Court, on November 18, 1980, appointed me to represent all claimants in the interpleader litigation. I was also a member of the lead counsel team and separately represented GTA on cross-claims.

Between October of 1979 and January 8, 1982, when I left the practice of law, I devoted approximately 30 percent of my time to this matter and the cases which were filed. Several other lawyers in our firm also devoted a

considerable amount of time to this litigation. I understand that the cases have all now been concluded and dismissed.

Other active counsel for the parties including the lead counsel team were as follows:

Martin N. Burke
Faegre & Benson
1300 Northwestern Bank Bldg.
Minneapolis, MN 55402
(612) 371-5300
Lead Counsel

Urban L. Roth
Poore, Roth, Robischon
& Robinson
1341 Harrison Avenue
Butte, MT 59701
(406) 792-1223
Lead Counsel

Bruce R. Toole & Terry Spear
Crowley, Haughey, Hanson
Toole & Dietrich
P.O. Box 2529
Billings, MT 59103
(406) 252-3441
Counsel for Pierce Packing

Terry Crapo, deceased
Holden, Kidwell, Hahn & Crapo
Idaho First National Bank Bldg.
Idaho Falls, ID 83401
(208) 523-0620
Third-Party Counsel

Dane C. Schofield
Peterson Law Offices
The Grand
100 North 27th
Billings, MT 59101
Third-Party Counsel

Chris J. Nelson
Berger, Anderson, Sinclair
& Murphy
2508 Third Avenue North
Billings, MT 59101
(406) 259-4274
Claims Counsel

W. H. Bellingham

Jack F. Lewis & Alex Blewitt
Jardine, Stephenson,
Blewett & Weaver
P.O. Box 2269
Great Falls, MT 59403
Co-counsel for Monsanto Chemical

Robert P. Piper
Karr, Tuttle, Koch, Campbell,
Mawer, Morrow & Sax
1111 Third Avenue, Suite 2500
Seattle, WA 98101
(206) 223-1313
Co-counsel for Monsanto Chemical

Charles R. Cashmore
McNamer, Thompson & Cashmore
620 First Bank Building
P.O. Box 1980
Billings, MT 59103
(406) 252-5678
Counsel for the Union Corp.
d/b/a Jacobson Metal Co.

Earl J. Hanson
Keefer, Roybal, Hanson,
Stacy & Jarussi
412 Hart Albin Bldg.
P.O. Box 2061
Billings, MT 59103
(406) 259-4548
Counsel for Hygrade Food
Products Corp.

Dolphy Pohlman
Corette, Smith, Pohlman
& Allen
P.O. Box 509
Butte, MT 59701
Counsel for Transformer
Consultants, Inc. and
S. D. Myers, Inc.

Joan M. Bernott
Assistant U.S. Attorney
Torts Branch, Civil Division
Department of Justice
Room 904 Safeway Building

Sidney R. Thomas
Moulton, Bellingham, Longo
& Mather, P.C.
P.O. Box 2545
Billings, MT 59103
(402) 248-7731
Counsel for General Electric
Company

521 12th Street, N.W.
Washington, D.C. 20530
(202) 724-6808
Counsel for the United States
of America

Jerome Anderson
Anderson, Brown, Gerbase,
Cebull & Jones, P.C.
Transwestern Life Building
Billings, MT 59101
Counsel for Pierce Packing

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

ANSWER TO QUESTION 19:

(a) From 1983 to 1986, I was chairman of a drafting committee of the Conference of Commissioners on Uniform State Laws dealing with the Uniform Rules of Evidence. The committee, consisting of lawyers, judges and academicians, reviewed each of the uniform rules and researched and drafted several amendments and new rules. The Conference adopted the work product of the committee at its annual conference in Boston, Massachusetts in August of 1986. The amendments and new rules were approved by the House of Delegates of the American Bar Association in February of 1987. I am presently continuing as chairman of the evidence committee to review and report on a proposed uniform rule on a parent-child privilege drafted by the Criminal Law Section of the American Bar Association and on several amendments to the Federal Rules of Evidence recently proposed by the Tort and Insurance Practice Section of the American Bar Association.

(b) Horacek, et al., Plaintiffs v. Thone, Governor of Nebraska, et al., Defendants, described in answer 18 was extremely significant to the citizens of Nebraska, Nebraska State government and mentally retarded citizens who need specialized services. Nebraska has been and continues to be a leader in programming for retarded citizens. Several of these exemplary programs commenced during the term of Governor (now United States Senator) J. James Exon and they continue to the present. The successful conclusion of this litigation which commenced in 1972 has been cited by some newspaper editorial writers as a significant legal accomplishment.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

ANSWER TO QUESTION 1:

I have a continuing financial interest in my former law firm, Knudsen, Berkheimer, Richardson & Endacott, to the extent that I am yet entitled to a small amount of fees, as they are collected, for services rendered by the firm prior to my becoming a United States District Judge on January 8, 1982. It is anticipated that these fees will all be collected or written off by the end of calendar year 1987.

I have an interest in the Knudsen, Berkheimer, Richardson & Endacott Self-Employment Retirement (Keogh) Plan. I became a participant in this plan while in the practice of law with this firm. My share of the assets of the plan are managed and invested by the plan administrator, the Trust Department of the National Bank of Commerce, Lincoln, Nebraska, along with other Keogh or retirement funds administered by the bank. No part of this plan may be paid to me without significant tax consequences prior to the time I reach 59.5 years of age, but I must begin to take payments no later than the time I reach 72 years of age.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

ANSWER TO QUESTION 2:

In every instance I will comply with any applicable statute, regulation or rule, any applicable code of judicial conduct and any other opinion or guideline promulgated for the federal judiciary. In appropriate situations, I will seek counsel and advice from the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

ANSWER TO QUESTION 3:

No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

ANSWER TO QUESTION 4:

Yes. In 1963, I was a co-coordinator of the campaign of Dean H. Petersen who was a candidate for the nonpartisan office of Mayor of the City of Lincoln. In 1964, I was campaign coordinator of the general election campaign of Dwight Burney who was a candidate for the office of Governor of Nebraska. In 1974, I was a campaign volunteer for the Thone for Congress Committee, the campaign committee for U.S. Congressman Charles Thone. In 1976, I was legal counsel for the Thone for Congress Committee, and in 1978 I was legal counsel for the campaign committee for Charles Thone, Governor of Nebraska. In the first two listed campaigns, I coordinated various aspects of each campaign. As counsel for the Thone committees, I provided legal counsel and advice with regard to the federal election laws and the Nebraska Political Accountability and Disclosure Act.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

ANSWER TO QUESTION 5:

Upon withdrawal from my law partnership, the partnership agreement provided that my capital account was to be paid in four quarterly installments beginning three months after withdrawal. The partnership agreement provided that I would share in only those fees which were accrued at the time of withdrawal. These pre-termination fees were to be paid quarterly, upon collection, beginning three months after withdrawal, until my interest had been paid. This has occurred. It appears that all contract payments will be completed by the end of 1987.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

96-183 0 - 89 - 4

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the federal judiciary within the federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

ANSWER TO QUESTION 1.

The judiciary, federal or state, should concern itself with cases and controversies which are ripe for resolution and which involve parties with sufficient legal interest to properly seek redress for specifically alleged complaints.

The criticisms mentioned above sometimes evolve from the efforts of the federal trial courts to fashion appropriate remedies after the basic constitutional controversy has been determined. These criticisms may not be as indicative of judicial policy making or expanded jurisdiction as much as indicative of the difficulties often encountered in devising satisfactory solutions where valid, competing interests are at issue.

The courts should, in my opinion, provide judicial interpretation of legislatively established policy and not attempt to establish policy through judicial interpretation. A federal judge is obligated to apply the law as enacted by the Congress and interpreted by a superior court.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

ANSWER TO QUESTION 2:

As a lawyer and a judge, I have concerned myself with the concept of equal justice under the law. As a lawyer, this concern was manifested in many ways including the providing of no fee or reduced fee legal services for persons of limited means through organized Bar Association programs and through routine attorney-client relationships. As a lawyer I also specifically concerned myself with the accessibility of the legal system to all persons and with the right of every person or group to receive adequate legal counsel without regard to available resources, economic or otherwise. As a judge, these concerns have continued.

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

June 5, 1987

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	29,437.63	Notes payable to banks—secured	None
U.S. Government securities—add schedule	None	Notes payable to banks—unsecured	None
Listed securities—add schedule A	19,267.75	Notes payable to relatives	None
Unlisted securities—add schedule B	25,827.75	Notes payable to others	None
Accounts and notes receivable:	None	Accounts and bills due (approximate)	750.00
Due from relatives and friends	None	Unpaid income tax	None
Due from others	None	Other unpaid tax and interest	None
Doubtful		Real estate mortgages payable—add schedule E	69,251.67
Real estate owned—add schedule C	174,143.26	Chattel mortgages and other liens payable	None
Real estate mortgages receivable	None	Other debts—itemize:	
Autos and other personal property	34,500.00	Insurance Policy Loans:	
Cash value—life insurance D	19,522.58	New York Life	9,566.31
Other assets—itemize:		Bankers Life	2,165.64
Knudsen, Berkheimer, Richardson & Endacott, contract rights	500.00	Lincoln National Life	2,279.57
**Keogh Plan	154,468.72	Keogh Plan Loan	15,000.00
Individual Retirement Accounts	13,779.10	Total liabilities	99,013.19
Total assets	471,440.79	Net worth	372,427.60
		Total liabilities and net worth	471,440.79

CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	None	Are any assets pledged? (Add schedule.)	No
On leases or contracts	None	Are you defendant in any suits or legal actions?	No
Legal Claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	None		
Other special debt	None		

**As of March 31, 1987.

SCHEDULE A

LISTED SECURITIES

American Telephone and Telegraph Company 150 shares and Debenture	$ 4,043.75
Southwestern Bell 45 shares	1,676.25
Ameritech 22 shares	1,856.25
U.S. West 30 shares	1,503.75
Bell Atlantic 30 shares	2,025.00
Pacific Telephone 60 shares	1,522.50
Nynex 30 shares	2,021.25
Bell South 67 shares	2,613.00
Pacific Gas & Electric Company Bone	2,000.00
	$19,261.75

SCHEDULE B

UNLISTED SECURITIES

Lincoln Telephone and Telegraph Company 315 shares	$14,568.75
Mineral Interest, Oil Lease Jefferson County, Kansas (estimate)	10,000.00
Forrest 1980 Drilling Program Partnership	1,259.00
	$25,827.75

SCHEUDLE C

REAL ESTATE OWNED

Home (1425 North 102nd Avenue, Omaha, Nebraska)	$164,000.00
Lake cabin (located on leased land at Lake Maloney, North Platte, Nebraska) one-fourth interest with brother and two sisters.	7,000.00
Agricultural land, 60 acres more or less, Stapleton, Nebraska, one-fourth remainder interest in a one-half interest (with brother and two sisters) after a life estate owned by my mother.	3,143.26
	$174,143.26

SCHEDULE D

CASH VALUE -- LIFE INSURANCE

New York Life	$13,822.18
*Bankers Life	2,455.15
Lincoln National Life	3,245.25
	$19,522.58

*As of September 1, 1986.

SCHEDULE E

REAL ESTATE MORTGAGES PAYABLE

Home Mortgage, Provident Federal Savings Bank Lincoln, Nebraska	$69,251.67

I. BIOGRAPHICAL INFORMATION (PUBLIC)

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

ANSWER TO QUESTION 11:

To my knowledge there have been no lapses in any of my admissions to practice. As earlier indicated, as a practitioner, I was admitted to practice in several United States District Courts on a case-by-case basis. Such admissions would have lapsed, presumably, as the cases were completed and closed.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

ANSWER TO QUESTION 12:

I have nothing additional to report under this inquiry.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

ANSWER TO QUESTION 1:

The only deferred income arrangements are those with my former firm which arrangements are outlined in my earlier response. I have received two payments from my former firm in 1987, $26.39 on April 4, 1987, and $26.78 on July 3, 1987. I would estimate that all future payments will not exceed $100.00. The June 30, 1987, value of my Keogh Plan referred to in my earlier answer was $154,863.10. I hope that I, my spouse or my heirs will ultimately receive all of this fund, with earnings, at some time in the future, but not prior to my reaching the age of 59.5 years.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

ANSWER TO QUESTION 2:

The only categories of litigation or financial arrangements that could present potential conflicts of interest are those which involve entities in which I or my spouse have a financial interest, cases that involve relatives or close friends, matters that I have handled in the past as a lawyer or that are now being handled by my former law firm, or litigation I have dealt with as a United States District Judge. I do now and will in the future recuse myself from cases which involve known relationships in any of these categories.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

ANSWER TO QUESTION 4:

A copy of my Executive Personnel Financial Disclosure Report dated June 9, 1987, is enclosed.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

ANSWER TO QUESTION 1:

While in private practice, I attempted to devote a portion of my billable time to no fee or reduced fee civil representation of disadvantaged citizens. In addition, I took assignments from the local Legal Services Corporation when it needed outside help because of conflicts of interest. I also participated in a program to provide defense services for indigent persons accused of misdemeanors during a period of time prior to the commencement of programs which provided public funds to pay for such representation. Additionally, I accepted federal habeas corpus assignments and federal and state criminal defense assignments for indigent persons when requested by the Court.

Since these activities occurred while I was in the private practice, I do not have access to specific case files or time sheets through which I could be more specific. However, I do now and have always strongly supported the policy espoused by Canon 2.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates--, through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

ANSWER TO QUESTION 2:

I have been a member of the masonic lodge since 1951. The masonic lodge has no women members. During attendance at the University of Nebraska, 1947 to 1951, I belonged to and, at times, lived in the house of a college fraternity which has no women as members. Since 1946, I have been a member of the United Presbyterian Church, a Christian denomination.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

ANSWER TO QUESTION 3:

To my knowledge there is no formal selection commission in the State of Nebraska or the Eighth Circuit which recommends candidates for the federal courts. When Judge Donald R. Ross of Omaha, Nebraska, announced his intention to take senior status as a United States Circuit Judge, I was approached by individuals from Nebraska who urged me to seek to fill the vacancy. I indicated an interest in the position. I was later contacted by Congresswoman Virginia Smith, Third District-Nebraska, who indicated an interest in forwarding my name to the Justice Department for consideration. She sought and received my permission to make the recommendation. Approximately one month later I was invited to the Justice Department for a conference on the subject. I was later told

that my name was being submitted to the Federal Bureau of Investigation for a background check and to the American Bar Association for an evaluation. On June 30, 1987, I was informed that my nomination was being sent to the Senate of the United States for consideration. During the procedure, to date, I have filled out questionnaires for the Justice Department, the Federal Bureau of Investigation, the American Bar Association, and the United States Senate.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

ANSWER TO QUESTION 4:

No.

AFFIDAVIT

I, Clarence Arlen Beam, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

August 24, 1987
(DATE)

Clarence Arlen Beam
CLARENCE ARLEN BEAM

GENERAL NOTARY-State of Nebraska
NANCY L. LANGEMEIER
My Comm. Exp. 2-3-88

Nancy L. Langemeier
(NOTARY)

SF 278 (Rev. 1/86)
FPM Chapter 734
U.S. Office of Personal Management

Financial Disclosure Report

Form Approved
OMB No. 3209-0002

Reporting Status (Check Appropriate Box)		Agency Use Only	OGE Use Only	Date of Appointment, Candidacy, Election or Nomination (Mo., Day, Yr.)	Termination Date (If Applicable) (Month, Day, Year)
☐ Incumbent	☒ New Entrant, Nominee, or Candidate ☐ Termination Filer				

Reporting Individual's Name	Last Name: BEAM	First Name and Middle Initial: CLARENCE A.
Position for Which Filing	Title of Position: JUDGE, UNITED STATES COURT OF APPEALS	Department or Agency (If Applicable): U.S. Courts
Location of Present Office	Address (Number, Street, City, State and ZIP Code): 215 North 17th Street, Omaha, NE 68101	Telephone No. (Include Area Code): 402-221-3615
Positions Held With the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: U.S. District Judge -- 1/1982 - present	
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination: Senate Judiciary	Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☒ No

Certification	Signature of Reporting Individual	Date (Month, Day, Year)
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.	Clarence Allen Beam	June 9, 1987
Other Review (If desired by agency)	Signature of Other Reviewer	Date (Month, Day, Year)
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official	Date (Month, Day, Year)
The information contained in this report discloses no conflict of interest under applicable laws and regulations.		
Office of Government Ethics Use Only	Signature	Date (Month, Day, Year)

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for Income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I** (Liabilities)—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II** (Agreements and Arrangements)—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if comments are continued on the reverse side) ☐

PREVIOUS EDITION USABLE

278-1-00

NSN 7540-01-070-5124

SF 278 (Rev. 1/96)
FPM Chapter 735
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name		Page Number		Schedule
BEAM, CLARENCE A.	**Assets and Income**	. 2		A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets								BLOCK C Income														BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). (J) joint NONE ☐		Category of Value (X)								Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)								Actual Amount Only If "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schd. B Part I for those assets including those sold for a loss.	
		None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000			Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
S DC	Examples: X Y Z Common				X					X								X								X	
	Doe Jones & Smith, Hometown, USA			X												ptnrshp income								$50,000			
1 S	American Telephone & Telegraph Co. common and debenture(J)		XX							XX		XX						XX									
2 S	Southwestern Bell common		XX							XX								XX									
3 S	Ameritech common		XX							XX								XX									
4 S	U.S. West common		XX							XX								XX									
5 S	Bell Atlantic common		XX							XX								XX									
6 S	Pacific Telephone common		XX							XX								XX									
7 S	Nynex common		XX							XX								XX									
8 S	Bell South common		XX							XX								XX									
9 S	Lincoln Telephone & Telegraph common, Lincoln, NE			XX						XX								XX									
10 J	Pacific Gas & Electric bond		XX									XX						XX									

PREVIOUS EDITION USABLE

276-278

Reporting Individual's Name: BEAM. CLARENCE A.

Assets and Income

Page Number: 3 | Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets							BLOCK C Income														BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)							Type of Income (X)							Category of Amount of Income (X)							Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schd. B Part I for those assets (including those sold for a loss.	
	None (or less than $1001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
S Exam- ples: X Y Z Common				X				X									X								X	
DC Doe Jones & Smith, Hometown, USA			X											ptership income								$50,000			
1 J Provident Federal Savings Bank, Lincoln, NE savings account				XX						XX						XX									
2 J S First National Bank of Omaha, Omaha, NE checking account																									
3 IRA CD's			XX							XX							XX								
4 J Omaha Federal Credit Union, Omaha, NE savings account		XX								XX						XX									
5 National Bank of Commerce, Lincoln, NE CD (J), Keogh						XX		XX		XX	XX									XX						XX
6 Plan administered by NBC Trust Department (This Keogh Plan is																								I cashed in the NBC CD on August 5, 1986, and placed the proceeds in Provident Federal Savings Bank.		
7 Knudsen, Berkheimer, Richardson & Endacott's Self-Employment																										
8 Retirement Plan. I became a participant in this																										
9 plan while in the practice of law with this firm.																										
10 My share of the assets of the fund is administered																										

Reporting Individual's Name: BEAM, CLARENCE A.

Assets and Income | Page Number: 4 | Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

	BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets: Category of Value (X)								BLOCK C Income: Type of Income (X)							BLOCK C Income: Category of Amount of Income (X)									Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	BLOCK D Transactions Test	
	Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			If yes, complete Schd. B Part I for those assets including those sold for a loss. YES	NO
	Examples: X Y Z Common			X				X									X								X	
	Examples: Doe Jones & Smith, Hometown, USA		X											ptnrshp income									$50,000			
1	and invested by the Trust Department of the Bank as part of this HR-10 plan.)																										
2																											
3 S	Donaldson, Lufkin & Janrette, New York, NY																								1986 IRA		
4	IRA account		XX					None to date							XX										purchased in 1987		
5	Mineral Interest Oil Lease, McLeod Lease, Jefferson County, Kansas			XX										royalty									$648.00 1986 ~~$139.00 1987~~			
6 J	Forrest Oil Limited Partnership, 1980 Denver, CO	XX												partnership distribution									$25.00 1986 ~~$50.00 3/31/87~~			
7	New York Life Insurance Co. 3 policies			XX						XX						XX										
8	Bankers Life Insurance Co. of NE, Lincoln, NE 1 policy		XX							XX					XX											

Reporting Individual's Name: BEAM, CLARENCE A.

Assets and Income

Page Number: 5 | Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A: Assets & Income Sources — Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	S or DC	Examples	BLOCK B: Valuation of Assets — Category of Value (X): None (or less than $1001)	$1,001-$8,000	$8,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	BLOCK C: Income — Type of Income (X): Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	Category of Amount of Income (X): None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	BLOCK D: Transactions Test — If yes, complete Schd. B Part I for those assets including those sold for a loss. YES	NO
		X Y Z Common				X				X									X									
		Doe Jones & Smith, Hometown, USA			X											ptnrship income									$50,000			
1	S	Lincoln National Life Insurance Co., Fort Wayne, IN		XX								XX						XX										
2		Judicial Survivors Annuity System				XX						XX								XX								I withdrew from JSAS in early 1987 and was refunded my contributions
3		Agricultural Land, Logan County, NE (This is a partial remainder		XX						None								XX										
4		interest with two sisters and one brother after a life estate																										
5		in my mother in approximately 70 acres of agricultural land.)																										
6		Lake cabin, Lake Maloney, North Platte, NE (This is a			XX					None								XX										
7		recreational cabin on leased land owned with my two sisters																										
8		and one brother.)																										
9		Knudsen, Berkheimer, Richardson & Endacott, Lincoln, NE		XX												contract payment									$1,748.78			
10	J	1982 Chevrolet		XX						None								XX										

SF 278 (Rev. 1/86)
5 CFR Chapter XCVI
U.S. Office of Personnel Management

OMB No. 3209-0002

Reporting Individual's Name	Assets and Income	Page Number	6	Schedule A
BEAM, CLARENCE A.				

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets							BLOCK C Income																	BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)							Type of Income (X)							Other (Specify Type)	Category of Amount of Income (X)									Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Sched. B Part I for those assets including those sold for a loss.	
		None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000		Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
S or DC	Examples: X Y Z Common			X					X									X									X	
	Doe Jones & Smith, Hometown, USA			X												ptnrship income								$50,000			
1 J	1986 Oldsmobile			XX					None								XX										
2																											
3																											
4																											
5																											
6																											
7																											
8																											
9																											
10																											

FILL USING ELECTRONIC TYPEWRITER

278-206

SF 278 (Rev. 1/86)
Part Chapter 73
U.S. Office of Personal Management

Form Approved
OMB No. 3209-0002

Reporting Individual's Name

BEAM, CLARENCE A.

Page Number	7	Schedule B

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE [X]

S or DC	Example	Identification of Assets	Type of Transaction (X) Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	Amount of Transaction (X) $1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000
	Example	X Y Z Common	X			2/1/83		X			
1											
2											
3											
4											
5											
6											

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only:
Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. Exclude transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), exclude gifts from relatives and exclude gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE [ ]

S	Source (Name and Address)	Brief Description	Value
Example	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conferen..e 6/15/83	$500
Example	Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
1	State of Nebraska	Reimbursement of travel expenses to Annual Conference of Commissioners on Uniform State Laws (NCCUSL) at Boston, MA in July-August 1986	$1,177.26
2	National Conference of Commissioners on Uniform State Laws	Reimbursement of travel expenses to committee meeting of Conference in Chicago, IL in April 1986	$ 626.60
3			
4			
5			
6			

PREVIOUS EDITION USABLE

278-108

SF 278 (Rev. 1/86)
3 Pkg Chapter 73A
U S Office of Personal Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name
BEAM, CLARENCE A.

Page Number	8	Schedule C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

S or DC		Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
	Examples	First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	25 yrs.			X		
		John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
1		Knudsen, Berkheimer, Richardson & Endacott Self-Employment Retirement (Keogh) Plan, Lincoln, NE	promissory note for loan to partially finance my personal residence	1985	11%	5 yrs	XX				
2		I have life insurance policy loans with New York Life and Bankers Life of Nebraska and my spouse has a life insurance policy loan with Lincoln National Life the proceeds of which were used to partially finance our personal residence. None of these loans exceed $10,000.00 although together they total slightly less than $15,000.00.									
3											
4											
5											
6											

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☐

Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example: Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Home town, USA	7/75 ptnership agmnt.
Pursuant to partnership agreement, I receive contract payments on fees collected by my former law firm for legal services performed prior to January 8, 1982, while I was a law partner in Knudsen, Berkheimer, Endacott & Beam, Lincoln, NE. In 1986 I received $607.89 in contract payments and $1,114.50 for a portion of a fee held in an intra-firm trust arrangement which was also, in essence, a contract payment. I have received $26.39 in contract payments in 1987.	various partners of Knudsen, Berkheimer, Endacott & Beam, a law partnership and myself	my first agreement was 9/71 but subsequent agreements were signed at various later times as new partners were admitted

PREVIOUS EDITION USABLE

278-100

110

SF 278 (Rev. 1/95)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name
BEAM, CLARENCE A.

Page Number	9	Schedule D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples:	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/82	6/83
	Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/75	11/83
	Downtown Kiwanis Club, Inc., Omaha, NE	non-profit service	director and trustee of Downtown Kiwanis Foundation	10/86	10/87

Part II
Compensation In Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☒

	Source (Name and Address)	Brief Description of Duties
Examples:	Doe Jones & Smith, Hometown, USA	Legal services
	Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction

PREVIOUS EDITION USABLE

278-1SB

JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 86-020

IN RE: PETITION OF
WILLIAM D. JONES

This matter comes before me, as Chief Judge, under 28 U.S.C. § 372(c)(1) on the verified complaint of William D. Jones against C. Arlen Beam, Chief Judge of the United States District Court for the District of Nebraska, and relates to rulings and handling of litigation processed by the judicial officer involved.

When a party litigant is dissatisfied with a ruling or processing of civil or criminal suits by a judicial officer, the proper course of relief is through regular appellate channels and not by filing complaints before the judicial council. The complaint in the present case must be dismissed for lack of jurisdiction under Section 3 of the Judicial Conduct and Disability Act of 1980. The subject matter of the complaint directly relates to procedural and substantive matters of litigation filed before the judicial officer. Since the complaint is not under the jurisdiction of the above Act, it is therefore dismissed.

DATED: October 27, 1986

DONALD P. LAY, Chief Judge

JUDICIAL COUNCIL OF THE EIGHTH CIRCUIT

JCP No. 87-013

IN RE: PETITION OF
WILLIAM D. JONES

This matter comes before me, as Chief Judge, under 28 U.S.C. § 372(c)(1) on the verified complaint of William D. Jones against C. Arlen Beam, Chief Judge, United States District Court for the District of Nebraska, and relates to rulings and handling of litigation processed by the judicial officer involved.

When a party litigant is dissatisfied with a ruling or processing of civil or criminal suits by a judicial officer, the proper course of relief is through regular appellate channels and not by filing complaints before the judicial council. The complaint in the present case must be dismissed for lack of jurisdiction under Section 3 of the Judicial Conduct and Disability Act of 1980. The subject matter of the complaint directly related to procedural and substantive matters of litigation filed before the judicial officer. Since the complaint is not under the jurisdiction of the above Act, it is therefore dismissed.

DATED: July 6, 1987

DONALD P. LAY, Chief Judge

AMERICAN BAR ASSOCIATION

Standing Committee on Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
Nil Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James K. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Cena W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Harwell
P.O. Box 85268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James N. Clark
303 East 17th Avenue
Suite 1200
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA CIRCUIT & FEDERAL CIRCUIT
James J. Beerbower
International Square
Suite 1275
1875 Eye Street, N.W.
Washington, DC 20006

BOARD OF GOVERNORS LIAISON
Sharp Whitmore
2005 Card Road
Fallbrook, CA 92028

STAFF DIRECTOR
Wareland L. Sandel, Jr.
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5685

STAFF ASSISTANT
Diane Livingston
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5701

RECEIVED AUG 1 3 1987

August 10, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: NICHOLAS H. POLITAN
United States District Court
for the District of New Jersey

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Nicholas H. Politan for appointment as Judge of the United States District Court for the District of New Jersey.

A majority of our Committee is of the opinion that Mr. Politan is "Qualified" for this appointment. The minority found him to be not qualified.

Sincerely,

Robert B. Fiske, Jr.

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members

NICHOLAS H. POLITAN

Birth:	November 13, 1935	Newark, New Jersey
Legal Residence:	New Jersey	
Marital Status:	Married	Marion E. Russo Politan 2 children
Education:	1953 - 1957	Rutgers University Newark College of Arts & Sciences A.B. degree
	1957 - 1960	Rutgers Law School LL.B. degree
Bar:	1961	New Jersey
Experience:	1960 - 1961	Law Clerk to Hon. Gerald McLaughlin U.S. Court of Appeals Third Circuit
	1961 - 1964	Cecchi and Politan Partner
	1964 - 1972	Krieger, Chodash & Politan Partner
	1972 - present	Cecchi and Politan Partner
	1980 - present	County Trust Company Chairman, Executive Committee
Office:	34 Park Avenue Lynhurst, New Jersey 07071 201 939-1550	
	The County Trust Company Lynhurst, New Jersey 07071	

To be United States District Judge for District of New Jersey

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

   Nicholas J. Politan

2. Address: List current place of residence and office address(es).

   Residence:

   9 Post Lane
   Livingston, New Jersey 07036

   Offices:

   Cecchi and Politan
   34 Park Avenue
   Lyndhurst, New Jersey 07071

   County Trust Company
   55 Park Avenue
   Lyndhurst, New Jersey 07071

3. Date and place of birth.

   November 13, 1935; Newark, New Jersey

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   Married
   Marian E. Politan, nee Russo
   Housewife

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   Rutgers University
   Newark College of Arts & Sciences
   Newark, New Jersey
   September 1953 to June 1957
   A.B. granted June 1957

   Rutgers Law School
   Newark, New Jersey
   September 1957 to June 1960
   L.L.B. granted June 1960

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

September 1960- August 1961
Judge Gerald McLaughlin
U.S. Court of Appeals for the Third Circuit
Federal Court House
Newark, New Jersey
(Judicial Law Clerk)

August 1961 - June 1964
Cecchi and Politan
55 Park Avenue
Lyndhurst, New Jersey 07071
(Senior Partner)

June 1964 - July 1972
Krieger, Chodash & Politan
921 Bergen Avenue
Jersey City, New Jersey
(Litigation Partner)

July 1972 - Present
Cecchi and Politan
34 Park Avenue
Lyndhurst, New Jersey 07071
(Senior Partner)

1980 - Present
County Trust Company
55 Park Avenue
Lyndhurst, New Jersey 07071
(Director and Chairman of the Executive Committee)

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Managing editor of Rutgers Law Review - 1959

Recipient, prizes in corporations, evidence, bills and notes - Rutgers Law School

Instructor of legal research and writing - Rutgers Law School - 1963

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association
1800 Main Street, N.W.
Washington, D.C. 20036

New Jersey Bar Association
172 West State Street
Trenton, New Jersey 08608

Association of the Federal Bar of
the State of New Jersey
1180 Raymond Boulevard
Newark, New Jersey 07102

Bergen County Bar Association
61 Hudson Street
Hackensack, New Jersey 07601

Essex County Bar Association
Gateway 1, 16th Floor
Newark, New Jersey 07102

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Organizations active in lobbying:

None

Other organizations:

Forest Hill Field Club
9 Belleville Avenue
Bloomfield, New Jersey 07003

Tiro A. Segno of New York, Inc.
77 MacDougal Street
New York, New York 10021

The Lotus Club
5 E. 66th Street
New York, New York 10021

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of New Jersey - 1961
U.S. District Court for the District
of New Jersey - 1961
U.S. Court of Appeals for the Second Circuit - 1969
U.S. Court of Appeals for the Third Circuit - 1971
U.S. Tax Court - 1972
U.S. Supreme Court - 1973

12. Published Writing: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

The Mentally Abnormal Witness: Challenges to His Competency and Credibility, 13 Rutgers Law Review 330 (1958) - written

As a member and managing editor of Rutgers Law Revie in 1959 and 1960, I participated in the editing of both volumes published during these years.

13. Health: What is the present state of your health? List the date of your last physical examination.

Good; April 3, 1987

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

Not applicable

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None

17. Legal Career: a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

September 1960- August 1961
Judge Gerald McLaughlin
U.S. Court of Appeals for the Third Circuit
Federal Court House
Newark, New Jersey
(Judicial Law Clerk)

August 1961 - June 1964
Cecchi and Politan
55 Park Avenue
Lyndhurst, New Jersey 07071
(Senior Partner)

June 1964 - July 1972
Krieger, Chodash & Politan
921 Bergen Avenue
Jersey City, New Jersey
(Litigation Partner)

July 1972 - Present
Cecchi and Politan
34 Park Avenue
Lyndhurst, New Jersey 07071
(Senior Partner)

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

From inception, my practice of law has been general in character. Initially, a partnership was formed with James D. Cecchi, Jr., a law school classmate. Our practice consisted of criminal and civil litigation, corporate representation, real estate transactions, and virtually every other type of legal matter. The firm was temporarily dissolved in 1964 when I joined the firm of Krieger and Chodash to become a litigation partner. During that eight year period, my practice was heavily weighted in the area of litigation, particularly Chancery, corporate and labor litigation, with additional responsibilities in the area of negligence, divorce and municipal governmental regulations and contracts. I left that firm in 1972 to rejoin James D. Cecchi, Jr. and have been engaged in the general practice of law with him since that time. Until 1980, my practice continued with heavy personal emphasis on

litigation. Since 1980, my role in the litigation area has been more supervisory and managerial. Two factors caused this modification:

(1) The law firm grew to have 9 attorneys with corresponding corresponding work load division; and

(2) In 1978, my partner and I acquired a controlling interest in a state chartered community bank, County Trust Company. Since 1980, in addition to the law firm, my partner and I have assumed active management control of the bank. I am, at present, functioning in two capacities, *i.e.*, as a senior managing partner of the law firm and as Chairman of the Executive Committee of the bank.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I have not had any one type or "typical" client. Instead, my clients have varied from large corporations to individuals. I have not specialized in one area, but have served my clients in a wide variety of legal areas, which are more fully described in my answer to question 17(b)(1) above.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

3. What percentage of your litigation was:

(a) civil;
(b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:

(a) jury;
(b) non-jury.

As indicated in my answer to question 17(b)(1), the character of my personal involvement in litigation changed in and about 1980. Prior to that date, my personal practice was much more litigation oriented and I appeared in court frequently. I estimate that I tried to conclusion approximately 15 cases each year and that the percentage distributions for my entire career prior to 1980 were:

Federal courts	10%
State courts of record	65%
Other courts	25%

Civil	85%
Criminal	15%
Jury	20%
Non-jury	80%

Since 1980, I have occasionally appeared in court, trying an average of three to five cases to conclusion each year. The percentage distributions were:

Federal courts	10%
State courts of record	80%
Other courts	10%
Civil	98%
Criminal	2%
Jury	0
Non-jury	100%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identifying the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) Case

Toscony Provision Company, Inc. and Henry Dei v. John R. Block, Secretary of the United States Department of Agriculture, and United States of America

Citation(s) or docket number(s)

538 *F. Supp.* 318 (D.N.J. 1982)

Client(s)

Toscony Provision Company, Inc. and Henry Dei

Court(s)

United States Department of Agriculture Before the Secretary of Agriculture
United States District Court for the District of New Jersey
United States Court of Appeals for the Third Circuit

Trial Judge(s)

Victor J. Palmer, A.L.J.
Lawrence A. Whipple, U.S.D.J.
Harold A. Ackerman, U.S.D.J.

Attorney(s) of other parties

Harold J. Reuben, Esq.
Attorney for John R. Block and United States in administrative proceeding
Office of General Counsel
United States Department of Agriculture
14th Street and Independence Avenue
South Building
Washington, D.C. 20250
(202) 447-5143

Bette E. Uhrmacher, Esq.
Assistant United States Attorney
Attorney for John R. Block and United States
in District Court and Court of Appeals
402 East State Street
Room 265
Trenton, New Jersey 08602
(609) 989-2190

Trial period(s)

September 16, and 17, 1980
December 8, 1983

Summary

The Federal Meat Inspection Act, 21 U.S.C. § 601, *et seq.*, authorizes the Secretary of the United States Department of Agriculture to permanently withdraw meat inspection service from a recipient "if he determines, after opportunity for a hearing is accorded to the...recipient...that such...recipient is unfit to engage in any business requiring inspection...because the...recipient, or anyone responsibly connected with the...recipient, has been convicted...of...any felony... ." 21 U.S.C. § 671. In a series of three administrative decisions, Agriculture Judicial Officer Donald A. Campbell, acting in his capacity as the Secretary's delegated authority, expressed and applied his conclusion that Congress intended to equate certain classes of felonies with "unfitness", thereby stripping the Secretary of any discretion in determining whether or not inspection service should be withdrawn. *In re Wyszynski Provision Co.*, 40 *Agric. Dec.* 17 (1981), *aff'd*, 538 *F. Supp.* 361 (E.D. Pa. 1982); *In re Utica Packing Co.*, 39 *Agric. Dec.* 590 (1980), *aff'd*, 511 *F. Supp.* 655 (E.D. Mich. 1981), *remanded*, 705 *F.*2d 460 (1982); *In re Norwich Beef Co.*, 38 *Agric. Dec.* 380 (1979), *aff'd*, No. H79-210 (D. Conn. 1981), *appeal dismissed*, No. 81-6080 (2d Cir. 1982).

In 1979, the Department of Agriculture commenced an administrative proceeding seeking the withdrawal of the meat inspection service of recipient Toscony Provision Company, Inc. because of the felony convictions of Toscony and Henry Dei, its president. In its defense, Toscony presented undisputed facts of mitigating circumstances. However, the Administrative Law Judge, in reliance upon the Judicial Officer's interpretation of 21 U.S.C. § 671, refused to consider Toscony's mitigating circumstances. His decision was affirmed by the Judicial Officer and the District Court.

This case was significant because it presented an issue of first impression to the Court of Appeals. While Toscony's appeal was pending before the Third Circuit, the Sixth Circuit in a case raising the same issue, held that, as a matter of law, the Secretary was statutorily required to consider mitigating circumstances. *Utica Packing Co. v. Bergland*, 511 *F. Supp.* 655 (E.D. Mich. 1981), *remanded*, 705 *F.*2d 460 (6th Cir. 1982).

As a result of the *Utica* decision, the Third Circuit remanded Toscony's appeal to the Administrative Law Judge for consideration of Toscony's mitigating circumstances. However, he concluded that, Toscony's mitigating circumstances notwithstanding, its inspection service should be withdrawn unless Henry Dei disassociated himself from it. This determination was affirmed by the Judicial Officer, the District Court and the Third Circuit.

I tried this case on behalf of Toscony before the Administrative Law Judge on September 16 and 17, 1980 and at the remand hearing on December 9, 1983. I orally argued against the Secretary's successful motion for summary judgment before District Court Judge Whipple and supervised the appellate and subsequent District Court motion work performed by another member of the firm.

(2) Case

In the Matter of the Suspension or Revocation of the License of Jerrold B. Goldstein, D.O., to Practice Medicine and Surgery in the State of New Jersey

Citation(s) or docket number(s)

Unreported opinion
Docket no. H-78-5127

Client(s)

Jerrold B. Goldstein, D.O.

Court(s)

Office of Administrative Law of the State of New Jersey

Trial Judge(s)

John J. Francis, J. (retired Justice of the New Jersey Supreme Court and temporarily assigned on recall as hearing examiner)

Attorney(s) of other parties

Joan D. Gelber, Esq.
Deputy Attorney General
Attorney for New Jersey Board of Medical Examiners
1100 Raymond Boulevard
Newark, New Jersey 07102
(201) 648-2478

Trial period(s)

December 5, 1978 through June 1, 1979
(29 hearing dates)

Summary

The New Jersey Board of Medical Examiners commenced an administrative proceeding seeking the revocation of Jerrold B. Goldstein's license to practice medicine. The Board alleged, among other things, that the treatment of obesity with thyroid therapy constituted gross medical malpractice and that Dr. Goldstein suffered from a severe psychological disability, *i.e.*, "overweaning narcissism", which profoundly impaired his medical judgment.

The propriety, as a matter of law, of thyroid therapy for the treatment of obesity was a novel issue in this State. Although extensive expert testimony was presented by both sides, the Hearing Officer did not reach the merits of this issue. Rather, he recommended license revocation on the basis of Dr. Goldstein's conduct with his patients and his mental condition.

I tried this case on behalf of Dr. Goldstein over 29 hearing dates and supervised the preparation of proposed findings of fact and conclusions of law. The testimony of every patient-witness called by the Board raised credibility issues requiring extensive cross examination. My representation was particularly difficult because Dr. Goldstein's personality disorder (obsessive, compulsive and narcissistic) led him to deny factual allegations made against him without regard to their truth.

(3) Case

National Kinney Corporation v. City of Jersey City, Jersey City Redevelopment Agency and Port Jersey North Corporation

Citation(s) or docket number(s)

Unreported opinion
Docket nos. C-4367-74
A-02755-75

Client(s)

National Kinney Corporation

Court(s)

Superior Court of New Jersey, Chancery Division
Superior Court of New Jersey, Appellate Division
Supreme Court of New Jersey

Trial Judge(s)

Frederick C. Kentz, Jr., J.S.C.

Attorney(s) of other parties

Dennis L. McGill, Esq.
Attorney for City of Jersey City
602 Pavonia Avenue
Jersey City, New Jersey 07306
(201) 656-2400

Joseph A. Panepinto, Esq.
Attorney for Jersey City Redevelopment Agency
Journal Square
Jersey City, New Jersey 07306
(201) 653-2000

Kevin J. Coakley, Esq.
Attorney for Port Jersey North Corporation
85 Livingston Avenue
Roseland, New Jersey 07068
(201) 535-0500

Trial period(s)

December 8, 9, 10, 11, 15 and 16, 1975

Summary

In September 1972, National Kinney Corporation ("Kinney") entered into a contract with the City of Jersey City requiring Kinney to expend up to $750,000 to formulate a complete redevelopment master plan for the residential, industrial and recreational use of approximately 2,200 acres located in the waterfront area of Jersey City to be known as Liberty Harbor. The plan was to include proposals for land use, density, transportation networks, performance standards, infrastructure networks, open space requirements and community facilities. In return for its expenditure of time, effort and funds, Kinney was to be the primary redeveloper with the right to purchase the entire site on a parcel by parcel basis.

After Kinney expended approximately $570,000 in the preparation of its proposed master plan, the City insisted that it purchase three parcels for $9,000,000, all cash. Kinney determined that this approach was unrealistic and recommended that the City reconsider the advantages of, as well as the necessity for, development schedules, take-down schedules for the transfer of title to each parcel, payment schedules and municipal participation in the construction of the infrastructure network of roads, bridges, sewers and utilities.

In June 1975, after unsuccessful efforts to lure a redeveloper on the basis of its "all cash up front" developmental approach, the City adopted Kinney's recommendations. However, it entered into a contract with Port Jersey North Corporation for the sale of one of the parcels originally offered to Kinney without first offering it to Kinney upon similar terms.

Kinney contended that the City's failure to offer the parcel to it after it reevaluated its developmental approach represented a breach of contract and filed suit for specific performance. I conducted all pre-trial discovery by oral depositions on behalf of Kinney and tried the case over six trial dates. I also wrote, with the assistance of associates, all of the appellate briefs.

The trial judge's decision in favor of the defendants was affirmed by the Appellate Division and Kinney's petition for certification to the Supreme Court was denied. During the pendency of the appeal, the City filed a motion to the Supreme Court for certification of an appeal pending unheard in the Appellate Division. Its motion was denied.

The significance of this case lies in the public importance of the redevelopment project. As a result of the litigation, approximately 2,200 acres of prime Hudson River front property on Upper New York Bay lay dormant. The successful development of the property was, and remains today, vitally necessary to the life and economic well-being of the City of Jersey City.

(4) Case

Vivian Aronesti Rudin v. Barry Rudin

Citation(s)or docket number(s)

Unreported opinion
Docket nos. M-3645-79
A-4473-80T2

Client(s)

Vivian Aronesti Rudin

Court(s)

Superior Court of New Jersey, Chancery Division
Superior Court of New Jersey, Appellate Division
Supreme Court of New Jersey

Trial Judge(s)

Conrad W. Krafte, J.S.C.
Harvey R. Sorkow, J.S.C.
Arthur Minuskin, J.S.C.

Attorney(s) of other parties

Arthur Rose, Esq.
Attorney for Barry Rudin in Chancery Division
35 Essex Street
Hackensack, New Jersey 07601
(201) 488-7800

Katherine J. Sweeney, Esq.
Attorney for Barry Rudin in Appellate Division and Supreme Court
10 Park Place
Morristown, New Jersey 07960
(201) 538-8008

Trial period(s)

December 1, 2, 3, 4, 5 and 8, 1980
January 30 and February 2, 1981
April 28, 29 and 30, May 4, 5 and 6, 1981

Summary

At the commencement of this divorce action, plaintiff-wife moved from New Jersey to Chicago, Illinois, with the four children of the marriage to escape the defendant-husband's violence. In response, he filed a motion for an order requiring her to return to the marital home in reliance upon *N.J.S.A.* 9:2-2, which prohibits the removal of children out of New Jersey in the absence of the consent of both parents or a court order. Since disputed issues of fact concerning the children's best interests were raised, the trial court conducted a *pendente lite* hearing. At the conclusion, it ordered plaintiff to return. Prior to trial, a second plenary hearing was required on the issue of whether the defendant physically abused the children.

This case is significant in that it is one of the first contested cases tried in this state after judicial guidelines for out-of-state relocations were established in *D'Onofrio v. D'Onofrio*, 144 *N.J. Super.* 200 (Chan. Div.), *aff'd o.b.*, 144 *N.J. Super.* 352 (App. Div. 1976). At the conclusion of the divorce trial, the trial court granted plaintiff leave to relocate. This determination, as well as all of its financial awards (with the exception of plaintiff's counsel fee, which was remanded for additional fact finding), were affirmed by the Appellate Division. (Prior to its determination on the merits, the Appellate Division dismissed defendant's appeal as a sanction for his failure to pay his alimony and child support obligations. This dismissal was reversed by the Supreme Court.) The counsel fee issue was subsequently settled prior to the remand hearing.

I personally tried both plenary hearings and the divorce trial on behalf of plaintiff. I also supervised pretrial discovery and the preparation of the appellate briefs by an associate of the firm.

(5) Case

Kerr Shelley, Inc., and George Kerr, Jr. v. Shelley Systems, Inc., National Kinney Corp. and Kinney-Shelley, Inc.

Citation(s) or docket number(s)

Unreported opinion
Docket no. L-4091-76

Client(s)

Shelly Systems, Inc., National Kinney Corp. and Kinney-Shelley, Inc.

Court(s)

Superior Court of New Jersey, Law Division

Trial Judge(s)

Arthur L. Troast, J.S.C.

Attorney(s) of other parties

Joseph L. Cook, Esq.
Attorney for Kerr Shelley, Inc. and George Kerr, Jr.
103 Eisenhower Parkway
Roseland, New Jersey 07068
(201) 228-9600

Trial period(s)

May 27, 1980 through July 22, 1980
(20 trial dates)

Summary

Plaintiffs instituted this action against the defendants to collect money allegedly due under the terms of an agreement with defendant, Shelley Systems, Inc., and defendant, Kinney-Shelley, Inc., whereby plaintiff, Kerr Shelley, Inc., was to provide a manufacturing facility, labor, materials, utilities and equipment to be used in connection with the manufacture of concrete housing modules. These modules when completed constituted independent apartment units which were transported to a building site and later assembled into an apartment building as part of "Operation Breakthrough", a low-cost housing project in Jersey City, New Jersey. Plaintiff, Kerr Shelley, Inc., sought damages in excess of $435,000 on this portion of its claim.

Plaintiff, Kerr Shelley, Inc., also alleged fraud, misrepresentation and tortious interference with prospective economic advantages against all of the defendants and sought punitive damages in addition to compensatory damages on those claims.

In addition, plaintiff, George M. Kerr, Jr., sought a judgment of indemnification against all of the defendants with respect to certain future potential claims against him.

Finally, plaintiffs sought to enforce the terms of a guarantee executed by defendant, National Kinney Corp., whereby National Kinney Corp. agreed to indemnify Kerr Shelley, Inc. for certain expenditures incurred on behalf of Shelley Systems, Inc.

I filed a counterclaim on behalf of the defendants seeking to recover compensatory damages for plaintiff's breach of the agreement between the parties relating to the manufacture of the concrete housing modules which were the subject matter of the litigation.

This case involved a myriad of complex issues of law and fact. Hundreds of exhibits were marked into evidence. The already intricate factual issues were made more difficult by the lapse of time between the occurrence which gave rise to the litigation (1972) and the date of the trial (mid 1980). Further complicating the case was the absence of any detailed records substantiating plaintiffs' claim inasmuch as those were allegedly destroyed in a fire. Thus, only

through intense cross examination of plaintiffs' witnesses was I able to expose to the court the flaws and inaccuracies in plaintiffs' claims.

A significant item of damage allegedly suffered by the plaintiffs was their prejudgment interest claim. The amount sought by plaintiffs by way of prejudgment interest exceeded $150,000. Prior to the court rendering its oral opinion, I was able to convince the court at oral argument that under New Jersey law, plaintiffs were not entitled to prejudgment interest and, therefore, that claim should be stricken by the court.

I was also able to convince the court that all of plaintiffs' claims for punitive damages as well as other significant items of plaintiffs' claim should be denied in their entirety.

I personally handled every phase of this complicated commercial litigation. I tried this case on behalf of my clients for 20 trial days during the period May 27, 1980 through July 22, 1980.

(6) Case

In the Matter of the Estate of Walter A. Seltmann, Deceased. Montclair National Bank and Trust Company v. Elaine C. Barnwell and Josef Frederick Seltmann

Citation(s) or docket number(s)

42 *N.J.* 497 (1964)

Client(s)

Elaine C. Barnwell

Court(s)

Essex County Court, Probate Division
Supreme Court of New Jersey

Trial Judge(s)

Ferdinand J. Masucci, J.C.C.

Attorney(s) of other parties

Allan A. Maki, Esq.
Attorney for Montclair National Bank and Trust Company
1 Garrett Mountain Plaza
West Paterson, New Jersey 07424
(201) 345-6400

Verling C. Enteman, Esq.
Attorney for Josef Frederick Seltmann
Formerly at 744 Broad Street
Newark 2, New Jersey
Current address unknown

Trial period(s)

January 12, 1963

Summary

This action involved the question of whether, under the law of the State of New Jersey as it existed in 1936, a testamentary disposition to "the child or children of my son" would be deemed to include an adopted child of the son. While the statute in question, *N.J.S.A.* 9:30-3, had been amended to include within such a devise children adopted subsequent to the date of the amendment, the law remained unclear with respect to children adopted prior to the amendment of the statute.

The action was instituted by the trustee bank to settle its account and for partial distribution. Cross applications were made on behalf of my client, the natural child, and an adopted child of the son of the testator. Both claimed entitlement to share in the inheritance.

Testimony was adduced with affidavits, briefs and exhibits. The trial court, after consideration of the moving papers, testimony, briefs and arguments of counsel, found that the adopted child was not entitled to take under the will and that the entire interest was the sole property of the natural child.

The adopted child appealed to the Superior Court of New Jersey, Appellate Division, and, while the matter was pending before that court, this case and several other cases involving the same issue were certified to the Supreme Court on its own motion. The Supreme Court reversed the trial court's holding and found that the adopted children could take under instruments executed prior to the amendment of the statute.

The significance of this case lies in the fact that it involved an important unresolved issue of law which, when decided, had a substantial impact upon estate law in New Jersey.

I personally handled all of the trial and appeal proceedings in this matter.

(7) Case

In the Matter of Atlantic Coast News Company and Arthur Mac Dowell, d/b/a Jersey Distributors and William T. Bixenman

Citation(s) or docket number(s)

197 *NLRB No.* 73 (1972)

Client(s)

Atlantic Coast News Company

Court(s)

National Labor Relations Board

Trial Judge(s)

Melvin J. Welles, Trial Examiner

Attorney(s) of other parties

Joseph C. Kelley, Esq.
Attorney for National Labor Relations Board
Office of General Counsel
National Labor Relations Board
615 Chestnut Street
7th Floor
One Independence Mall
Philadelphia, Pennsylvania 19106
(215) 597-7650

Joseph J. Mahon, Esq.
Co-counsel for National Labor Relations Board
United States Postal Service
Legal Department
Philadelphia, Pennsylvania 19197-0170
(215) 496-6346

Frank P. Friedman, Esq.
Attorney for Arthur Mac Dowell
1 Broad Street
Freehold, New Jersey 07728
(201) 431-4545

Trial period(s)

June 7, 8, and 9, July 8, 9, 20, 21, 1971

Summary

Atlantic Coast News Company, a wholesaler of newspapers and magazines, was charged with having violated Sections 8(a)(1) and (3) of the National Labor Relations Act. The Board alleged that the sole purpose of Atlantic Coast's partial sale of its business and the subsequent discharge of nine employees was discriminatory and the result of its anti-union animus against them for their engagement in union activities.

I personally tried this case on behalf of Atlantic Coast. It was vigorously prosecuted by co-counsel for the Board. It is significant to the extent that, in order to successfully defend the employer, I was required to discredit, by cross examination, the testimony of all nine employees. At the conclusion of the hearing, the trial examiner found in favor of Atlantic Coast and against the Board.

(8) Case

Anne Smith v. Prentice-Hall, Inc.

Citation(s) or docket number(s)

Unreported opinion
Docket no. C-3807-73

Client(s)

Prentice-Hall, Inc.

Court(s)

Superior Court of New Jersey, Chancery Division

Trial Judge(s)

Samuel D. Lenox, Jr., J.S.C.

Attorney(s) of other parties

Sidney David, Esq.
Attorney for Anne Smith
600 South Avenue W.
Westfield, New Jersey 07090
(201) 654-5000

Trial period(s)

September 8, 1975

Summary

In a detailed complaint, plaintiff Anne Smith, creator of the publication known as "Just Between Office Girls", sought judgment against the defendant, Prentice-Hall for rescission of the publishing agreement, reformation or, alternatively, modification, an accounting, compensatory damages, punitive damages and an injunction prohibiting the defendant from publishing a competing newsletter.

I personally handled every aspect of this litigation on behalf of Prentice-Hall. Plaintiff's trial presentation focused upon the dichotomy between her and publishing giant Prentice-Hall. This case was significant in that my successful defense of Prentice-Hall required extensive trial preparation, precise trial strategy, forceful (yet delicate) cross examination, and clear legal analysis to rebut plaintiff's many intertwining theories of recovery.

(9) Case

American Book-Stratford Press, Inc.; American Bible Society; Montville Warehousing Co., Inc.; American Book Publishers Council, Inc.; Associated Book Service, Inc.; Scholastic Magazines, Inc.; The Mac Millan Company; Wayne Warehousing Corp.; Prentice- Hall, Inc.; Harper & Row Publishers, Inc.; Haddon Craftsmen, Inc.; Regensteiner Publishing Enterprises, Inc.; Chicago Book Manufacturing, Inc.; and National Book Company of Scranton v. Winton M. Blount, Postmaster General of the United States, et al.

Citation(s) or docket number(s)

446 *F.2d* 588 (3d Cir. 1971)

Sub nom., In Re Fourth Class Postage Regulations, 298 *F. Supp.* 1326 (J.P.M.D.L. 1969)

Client(s)

American Book-Stratford Press, Inc.; American Bible Society; Montville Warehousing Co., Inc.; American Book Publishers Council, Inc.; Associated Book Service, Inc.; Scholastic Magazines, Inc.; The Mac Millan Company; Wayne Warehousing Corp.; Prentice-Hall, Inc.; Harper & Row Publishers, Inc.; Haddon Craftsmen, Inc.; and National Book Company of Scranton

Court(s)

United States District Courts for the District of New Jersey, for the Middle District of Pennsylvania, and for the Northern District of Illinois, Eastern Division
Judicial Panel on Multi-District Litigation
United States Court of Appeals for the Third Circuit

Trial Judge(s)

Anthony T. Augelli, U.S.D.J.

Attorney(s) of other parties

Thomas J. Alworth, Esq.
Then Assistant United States Attorney
Attorney for Postmaster Generals of United States and all other defendants
131 Madison Street
Morristown, New Jersey 07960
(201) 285-1000

James A. Scarpone, Esq.
Attorney for Regensteiner Publishing Enterprises, Inc. and Chicago Book Manufacturing, Inc.
Gateway 1
Newark, New Jersey 07102
(201) 624-7501

Trial period(s)

September 20, 1968 through March 10, 1968 (Numerous hearing dates)

Summary

The genesis of this case is Postal Regulation 135.2(a)(6), which basically directed that certain sorting of special fourth class educational mail heretofore performed by the Postal Service be performed by the mailers. I made application to the United States District Court for the District of New Jersey for preliminary injunctive relief to stay the implementation of the regulation pending a full hearing as to its legality. Injunctions were issued. Similar preliminary injunctions were subsequently issued on an

individual basis for the remaining New Jersey plaintiffs.

Relying upon the New Jersey District Court's action, the United States District Courts for the Middle District of Pennsylvania and for the Northern District of Illinois also granted preliminary relief to other similarly situated plaintiffs. Due to the complex nature of these proceedings and the similarity of the actions pending in different districts, a motion was made before the Judicial Panel on Multi-District Litigation to consolidate all actions for discovery purposes. By written opinion at 289 *F. Supp.* 1326 (J.P.M.D.L. 1969), all cases were consolidated in the United States District Court for the District of New Jersey.

In the course of the pretrial stages of the case, I commenced taking depositions of postal officials who were responsible for the research and consequent promulgation of the postal regulation in question. During this period of time, as a direct result of the pending actions and the pretrial proceedings, the Postal Service agreed to revisions of the regulation to satisfy my clients' objection. The new regulation dramatically changed the duties placed upon the mailer in the sorting and sacking of special fourth class mail and contained a schedule of timing for its implementation.

Additional motions to increase the amount of the bonds posted as security in connection with the preliminary injunctions were denied. Thereafter, the United States Attorney, on behalf of the Postal Service, moved to vacate the injunctions on the grounds that the lawsuits were moot. However, notwithstanding that application, the Postal Service refused to dismiss that aspect of the lawsuit relating to the question of whether or not the bonds posted as security for the injunctions should be vacated. Upon cross motions, the District Court dismissed the lawsuits as moot and discharged the bonds. That decision was appealed by the United States Attorney to the Court of Appeals for the Third Circuit which reversed and remanded to the trial court for a hearing the issues involving the bonds. Subsequently, the matter of the amounts of liability on the bonds was adjusted between the parties.

There are a number of reasons that this case is significant. The litigation in question was one of general application to all special fourth class mailers throughout the United States. Secondly, to successfully attack a federal regulation such as the one in the instant case, and to obtain immediate preliminary relief, required meeting stringent standards and burdens of proof. Thirdly, the result obtained constituted a major victory.

(10) Case

J. Rich Steers, Inc. v. New Jersey Turnpike Authority

Citation(s) or docket number(s)

Unreported opinion
Docket no. L-33254-73

Client(s)

J. Rich Steers, Inc.

Court(s)

Superior Court of New Jersey, Law Division
Superior Court of New Jersey, Appellate Division

Trial Judge(s)

Sylvia B. Pressler, J.S.C.
Roger W. Breslin, J.S.C.

Attorney(s) of other parties

Ward J. Herbert, Esq., Retired Judge of the Superior Court of New Jersey
General Counsel for New Jersey Turnpike Authority
550 Broad Street
Newark, New Jersey 07102
(201) 622-4444

Herbert I. Olarsch, Esq.
General Counsel for New Jersey Turnpike Authority
New Jersey Turnpike Authority
Box 1121
New Brunswick, New Jersey 08903
(201) 247-0900

Robert N. Wilentz, C.J., Chief Justice of the New Jersey Supreme Court
General Counsel for New Jersey Turnpike Authority
313 State Street
Perth Amboy, New Jersey 08861
(201) 324-1600

William S. Greenberg, Esq.
Special Counsel for New Jersey Turnpike Authority
301 Carnegie Center
Princeton, New Jersey 08540
(609) 987-1200

Trial period(s)

June 1974 through April 1977
(Numerous hearing dates)

Summary

This case involved a claim by J. Rich Steers, Inc. against the New Jersey Turnpike Authority in connection its road widening work on the New Jersey Turnpike. Steers' claim was for an amount in excess of $2,000,000 for additional costs incurred as a result of delays, inter-ruptions, changes in plans and specifications, and changed conditions caused by and/or under the control of the Turnpike Authority.

The cause of action required the interpretation of complex contracts and the analysis of daily data dealing with a heavy construction project. Steers had to prove the factual circumstances concerning a multitude of construction delays and disruptions. After extensive pretrial negotiations, the Commissioners of the Authority rejected a settlement endorsed by their engineering litigation consultants. The rejection precipitated a motion on behalf of Steers to join the individual Commissioners as defendants. When that application was denied, a separate action was instituted against them.

The pretrial discovery was extensive. Initially, I served oral deposition notices for the appearance of all active Authority construction personnel, as well as the individual commissioners. The Authority sought to limit every aspect of discovery. When the trial court denied Steers access to certain documents, motions for leave to appeal to the Appellate Division were filed and subsequently denied.

Thereafter, both parties conducted depositions of fact and expert engineering witnesses. During the pretrial examination of one of the expert witnesses, document discovery again became a problem because the Authority claimed that certain documents were privileged. As a result, Steers filed a motion to compel the Authority to turn over all of the documents used by the witness in connection with his testimony. That order, which required the production of documents, became the subject matter of another motion for leave to appeal to the Appellate Division, which was denied.

The case proceeded through a series of hearings and pretrial discovery phases with the parties ultimately amicably adjusting the matter for a payment to Steers of $1,100,000.

I personally handled virtually every aspect of this matter on behalf of Steers with limited appellate brief writing assistance of an associate. The significance of this case lies in the public importance of its subject matter, *i.e.*, the construction of the New Jersey Turnpike and the amount of taxpayers' funds expended, its complex factual pattern, the extensive, time consuming nature of its pretrial discovery, and the unique questions of pretrial discovery law presented to the Law and Appellate Divisions.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

In addition to the activities described in my answer to question 18 above, the following are some of the other major areas of legal activities that I have performed in my legal career.

(a) During the past 15 years, I have been general counsel to the Silk and Rayon Printers & Dyers Association, Inc., which consists of approximately 40 firms engaged in the textile dyeing and finishing business in the greater Paterson area of New Jersey. My work with that association has included the negotiation of collective bargaining agreements for its members, who, as a group, employ approximately 3,000 workers. It involved long and intense collective bargaining. In addition thereto, grievance resolution during the course of each contract was another one of my primary responsibilities. I have also been active in the drafting of state legislation designed to protect textile processor's liens and I have represented virtually all of the members in their general corporate and litigation matters.

As a related activity, I sit as a management trustee on the Textile Workers Pension Fund, a $100,000,000 jointly administered pension fund, that has approximately 10,000 active participants. In my role as trustee, I have been deeply involved in the administration of the fund, as well as with the laws applicable to its administration.

(b) As an administrative officer of County Trust Company and with my firm as general counsel, I have had the opportunity to participate in and direct the reorganization of the entire administration of the bank, including but not limited to, its commercial lending department, customer services, investment policies and general administration. This work involved, to a significant degree, the implementation of sound legal principles to the administration of the bank as a whole, and in particular, its loan department. This work included the redrafting and restructuring of loan offering statements, loan documentation, mortgages, and financial disclosure forms. Virtually all facets of the lending operation were reshaped under my supervision. Additionally, all of the legal filing requirements for the bank *i.e.*, Federal Deposit Insurance Company forms (call reports), Federal Reserve reports, Securities and Exchange Commission reports, and proxy statements were directly supervised by me.

(c) As special counsel to the County of Bergen, I participated in the protracted proceedings concerning increases in rates requested by the Hackensack Water Company. This required my detailed involvement with the entire rate making process, preparation for testimony, presentation of testimony, cross examination, preparation of briefs and oral arguments concerning rates. The result of this involvement caused a substantial saving to all of the residents of Bergen County.

(d) As general counsel to a large construction company, I had the opportunity to become involved in the negotiation of multimillion dollar heavy construction contracts, the bidding process and the preparation and litigation of construction claims. Of most significance in this area of my practice with this client was its involvement with a Nigerian based company in connection with certain joint ventures that were performed in that country. On behalf of my client, I was the primary negotiator and author of the contractual documents necessary to create this joint venture which ultimately functioned and completed projects in Nigeria.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Pursuant to Agreement, I will receive the distribution of my share of the capital account and partnership income of Cecchi & Politan to the date of Senate confirmation. In addition thereto, my interest in the real and personal property owned by the partnership will be transferred to the remaining partners, and the liabilities, as more particularly described in footnote 3 of the Financial Net Worth Statement, will be assumed by the remaining partners. I will be released from all personal liabilities.

Pursuant to Agreement, I will receive severance pay from County Trust Company in a dollar amount measured by my annual salary. The payment will be the lesser of salary computed through December 31, 1988 or salary computed to the date upon which the Merger Agreement between County Bancorp., Midlantic Banks Inc. and Midlantic Acquisition Corporation is consummated, whichever date shall first occur.

I will have no future financial or business interests for which I will receive compensation after my confirmation.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I intend to follow the Judicial Code of Ethics and recuse myself when appropriate.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

Copies of my Executive Personnel Financial Disclosure Report have been provided with this questionnaire.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

As attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of campaign, your title and responsibilities.

No

NICHOLAS H. POLITAN

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

	ASSETS		LIABILITIES		
Cash on hand and in banks (J)	60,000.00		Notes payable to banks—secured	59,062.85	5
U.S. Government securities—add schedule			Notes payable to banks—unsecured		
1 Listed securities—add schedule (H)	3,205,937.97		Notes payable to relatives		
Unlisted securities—add schedule			Notes payable to others		
Accounts and notes receivable:			Accounts and bills due		
Due from relatives and friends			Unpaid income tax		
Due from others			Other unpaid tax and interest		
Doubtful			Real estate mortgages payable—add schedule	774,889.99	6
2 Real estate owned—add schedule (J)	1,345,000.00		Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts—itemize:		
Autos and other personal property (J)	205,000.00				
Cash value—life insurance (H)	28,887.35				
Other assets—itemize: (H)					
Cecchi & Politan Law Prtn.	250,000.00				
Greyhounds (W)	5,000.00				
County Trust Pension (H)	57,875.18		Total liabilities	1,333,952.84	
County Trust 401K net (H)	47,300.17		Net worth	3,912,854.28	
Additional Assets Below	5,246,807.12		Total liabilities and net worth	5,246,807.12	
Total assets					
CONTINGENT LIABILITIES			**GENERAL INFORMATION**		
As endorser, comaker or guarantor	See Footnote 3		Are any assets pledged? (Add schedule.)	None except as noted	
On leases or contracts			Are you defendant in any suits or legal actions?	No	
Legal Claims			Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax	See Footnote 4				
Other special debt					

Additional Assets:

Dean Witter - Keogh Retirement Account (H)	20,456.45
Northwestern Mutual - IRA Account (H)	14,854.00
County Trust Company - IRA Account (W)	6,496.00

1. 38,289 shares of common stock of County Bancorp., a New Jersey Chartered Bank. Under date of May 14, 1987 a Merger Agreement between County Bancorp., Midlantic Banks Inc. and Midlantic Acquisition Corporation was executed, which Merger Agreement calls for the purchase by Midlantic of all of the shares of County Bancorp. for a per share price of $83.73.
2. No. 9 Post Lane, Livingston, New Jersey, valued at $1,050,000.00 and No. 19 Villa Lane, Boynton Beach, Florida, valued at $295,000.00.
3. If confirmed, my interest in Cecchi & Politan will be liquidated. The law firm owns certain real estate and personal property located at no. 34 Park Avenue, Lyndhurst, New Jersey. In connection with that property, the following mortgages and indebtednesses are cosigned by me:

Meadowlands National Bank, Loan No. 14494	
1st mortgage - 34 Park Avenue, Lyndhurst, NJ	$600,000.00
Meadowlands National Bank, Loan No. 14945	
2nd mortgage - 34 Park Avenue, Lyndhurst, NJ	60,000.00
Meadowlands National Bank, Loan No. 15404	
Equipment	30,090.07
National Community Bank, Credit Line #0904961	235,000.00
Broadway Bank & Trust Co., Loan No. 0300011239	81,000.00

Upon the liquidation of my interest in the law firm, I will transfer my interest in the real estate, personal property and law practice, and will be released from all mortgages and indebtednesses of the law firm.

4. My income tax for the years 1979 and 1980 was the subject matter of aproceeding in the U.S. Tax Court entitled Nicholas H. Politan and Marian E. Politan vs. Commissione: of Internal Revenue, Docket No. 337083. The case was settled and I anticipate receiving a statement for taxes due for the years 1979 and 1980 in the approximate sum of $67,843.00 which will be paid upon receipt of the statement from the Internal Revenue Service.
5. County Trust Company Line of Credit, Note 3567 100,000.00
   County Trust Company Note No. 6646 59,062.85
   Broadway Bank & Trust Co. Loan No. 1600025395 400,000.00
6. County Trust Company Mortgage No. 4826 596,195.96
   County Trust Company Mortgage No. 4846 178,694.03

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

During the course of my legal career, I have at various times been appointed to represent indigent persons in the criminal and matrimonial areas. I have no specific records of those undertakings to describe the specific instances and amounts of time involved. In addition thereto, I have been actively involved in the raising of monies for charities to aid and assist the underprivileged, both directly and indirectly.

During the past three years, I have devoted approximately 30 hours each year to the raising of funds to provide scholarships for those who require same by calling upon my clientele to make contributions. My law office has acted as *pro bono* counsel for a scholarship fund for graduating high school students honoring a former municipal official and for the founders of an institution for higher learning. We have also participated in a wide variety of charitable endeavors, both by contributing and raising money for same. During the course of my legal career and the operation of my law firm, we have had a positive commitment toward helping those who need help.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates-- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I am a member of Tiro A. Segno of New York, Inc., a small family dining club located in New York City. This club was originally founded in the late 1800's by Italian immigrants who would shoot pigeons in what is now Central Park and return them to the club house to be cooked and eaten by the members and their families. Over the course of years, the club developed into a dinner club, where members and their families and friends use the facilities for dining.

The voting membership of the club is restricted to men of Italian ancestry. However, the club does not restrict its use to the named family member. Wives, children and guests of members are permitted full access to all of the club's dining facilities. The non-voting membership is not restricted to men of Italian descent. In addition, wives of deceased members continue to maintain membership throughout their life. It is not a business luncheon club, but rather, a more traditional ethnically oriented social club.

I have not done anything to try to change these policies. However, if the Committee feels that my membership in this club is inappropriate, I will consider resigning from same.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is no selection commission in my jurisdiction.

My entry into the judicial selection process was initiated by John Inganamort, Chairman of the Republican Party of Bergen County, who recommended me to the Department of Justice. Thereafter, I was interviewed on three occasions by various members of the Department. In addition thereto, I met and discussed my proposed nomination with several members of the New Jersey Congressional delegation, all of which led to a notification by the Department that I was preliminarily being considered for the nomination. I received notice of my nomination through a telephone call from the President of the United States.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

No

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The role of federal judiciary is one which is distinct of that played by the executive and legislative branches of government. There are clear delineations of authority outlined in the Constitution which require each branch of government to act within its delegated spheres of power. The judiciary's function is to adjudicate cases and controversies that come before it by the application of the laws involved. It is not designed to either legislate nor administrate the law or to create controversies where none exist. It is the constitutional duty of the federal judiciary to promptly discharge its responsibility in grievance resolution between parties.

SF 278 (Rev. 1/89)
FPMR Chapter 736
U.S. Office of Personnel Management

Financial Disclosure Report

Form Approved
OMB No. 3209-0002

Reporting Status (Check Appropriate Box)		Agency Use Only	OGE Use Only	Date of Appointment, Candidacy, Election or Nomination (Mo., Day, Yr.)	Termination Date (If Applicable) (Month, Day, Year)
☐ Incumbent	☒ New Entrant, Nominee, or Candidate ☐ Termination Filer			August 7, 1987	
Reporting Individual's Name	Last Name: Politan	First Name and Middle Initial: Nicholas H.			
Position for Which Filing	Title of Position: United States District Court Judge District of New Jersey	Department or Agency (If Applicable):			
Location of Present Office	Address (Number, Street, City, State and ZIP Code): 34 Park Avenue Lyndhurst, New Jersey 07071		Telephone No. (Include Area Code): (201) 939-1550		
Position(s) Held With the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: None				
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination: Senate Judiciary Committee	Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☒ No			

Certification	Signature of Reporting Individual	Date (Month, Day, Year)
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.		August 11, 1987
Other Review (If desired by agency)	Signature of Other Reviewer	Date (Month, Day, Year)
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official	Date (Month, Day, Year)
The information contained in this report discloses no conflict of interest under applicable laws and regulations.		
Office of Government Ethics Use Only	Signature	Date (Month, Day, Year)

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if comments are continued on the reverse side) ☐

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I** (Liabilities)—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II** (Agreements and Arrangements)—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

SF 278 (Rev. 1/95)
5 CFR Chapter XIV
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-7000

Reporting Individual's Name		Page Number		
Nicholas H. Politan	**Assets and Income**	2		Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets							BLOCK C Income														BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)							Type of Income (X)							Category of Amount of Income (X)								If you, complete Sched. B Part I for those assets including those sold for a loss.
S or DC		None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	$250,001-$500,000	Over $500,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	YES	NO
S	Examples: X Y Z Common			X					X									X							X	
	Doe Jones & Smith, Hometown, USA			X											ptnrshp income									$50,000			
1	County Bancorp. - Common						X		X													X					
2	Cecchi & Politan Lyndhurst, NJ						X								Law Ptnrshp									301,685.			
3	Cecchi & Politan Partnership Real Property						X									X											
4	Cecchi & Politan Partnership Equip.& Furn.					X										X											
5	County Trust Company (Employer)														Wages									187,306.			
6	County Trust Company (Employer)														Directors Fees									10,800.			
7	Arlington House		X												Ptnrshp Income	X											
8	HAB Associates				X										Ptnrshp									50,000.			
9 S	Greyhounds		X												Invstmt Income									31,370.			
10	County Trust Company Money Market Account				X						X								X								

PREVIOUS EDITION USABLE

870-300

Continued on Rider

	BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets								BLOCK C Income																		BLOCK D Transaction Test	
	Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)								Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)									Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schd. B Part I for these assets including those w/ for a loss.	
			None (or less than $1,001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000		Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$1,000,000	Over $1,000,000			YES	NO
S or DC	Examples:	X Y Z Common			X		X				X										X						$60,000		X	
		Doe Jones & Smith, Hometown, USA															otherwise income													
11	S	County Trust Company Money Market Account				X							X								X									
12		County Trust Company Pension Fund					X						X								X									
13		Dean Witter Keogh Account				X							X								X									
14		County Trust Company 401K					X						X								X									
15		Northwestern Mutual IRA				X					X										X									
16	S	County Trust Company IRA			X								X							X										
17		Life Insurance Cash Surrender Value				X					X										X									

PREVIOUS EDITION USABLE

SF 278 (Rev. 1/89)
Part Approved
OMB No. 3209-0007
5 CFR Chapter XIV
U.S. Office of Personal Management

Reporting Individual's Name
Nicholas H. Politan

Page Number 4 Schedule B

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE [X]

S or DC	Example:	Identification of Assets	Type of Transaction (X) Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	Amount of Transaction (X) $1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000
		X Y Z Common	X			2/1/83		X			
1											
2											
3											
4											
5											
6											

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only: Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. **Exclude** transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), **exclude** gifts from relatives and exclude gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE [X]

S	Example:	Source (Name and Address)	Brief Description	Value
		Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/83	$500
		Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
1				
2				
3				
4				
5				
6				

SF 278 (Rev. 1998)
Form Approved
OMB No. 3209-0001
278 Chapter 734
U.S. Office of Personal Management

Reporting Individual's Name
Nicholas H. Politan

Page Number	5	Schedule C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

	Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
S or DC	Example: First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	20 yrs.			X		
	Example: John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
1	County Trust Company, Lyndhurst, N.J. 07071	Line of Credit - Promissory Note	1986	Prime + 1	1 yr			X		
2	County Trust Company, Lyndhurst, N.J. 07071	Time Collateral Loan - Promissory Note	1986	9.5	7 yrs			X		
3	Broadway Bank & Trust Company, Paterson, N.J. 07510	Time Collateral Loan - Promissory Note	1986	9.0	1 yr					X
4	Income Tax 1979-1980 subject of Tax Court Proceeding Docket No. 337083	Tax liability under dispute	79-80					X		
5	Meadowlands National Bank, North Bergen, N.J. 07047	Mortgage on law partnership real property	1984	Prime + 1	5 yrs					X
6	Meadowlands National Bank, North Bergen, N.J. 07047	Law partnership equipment loan	1985	Prime + 1	5 yrs			X		

Continued on Rider

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☐

Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example: Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Home town, USA	7/78 partnership agmnt.
Pursuant to Agreement, I will receive the distribution of my share of the capital account and partnership income of Cecchi & Politan to the date of Senate confirmation. In addition thereto, the real and personal property as disclosed on lines 3 and 4 of Schedule A will be transferred by me to the remaining partner and the liabilities as disclosed in Schedule C lines 5,6,7,8 and 9 will be assumed by the remaining partner and I will be released from all personal liability.	Cecchi & Politan, James D. Cecchi	8/11/87
Pursuant to Agreement, I will receive severance pay from County Trust Company in a dollar amount measured by my annual salary. The payment will be the lesser of salary computed through December 31, 1988 or salary computed to the date upon which the Merger Agreement between County Bancorp., Midlantic Banks Inc. and Midlantic Acquisition Corporation is consummated, whichever date shall first occur.	County Trust Company, James D. Cecchi	6/9/87

PREVIOUS EDITION USABLE

278-100

	S or DC	Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
	Example:	First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	28 yrs.			X		
	Example:	John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
7		Meadowlands National Bank, North Bergen, N.J.	Law Partnership Equipment Loan	1985	13.0	4 yrs		X			
8		National Community Bank, Lyndhurst, N.J.	Law Partnership Promissory Note	1985	8.25	3 yrs				X	
9		Broadway Bank & Trust Company, Paterson, N.J.	Law Partnership Promissory Note	1987	8.25	60 dys			X		

SF 278 (Rev. 1/92)
Fifth Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0006

Reporting Individual's Name
Nicholas H. Politan

Page Number	7	Schedule D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples: Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/82	6/83
Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/78	11/83
Cecchi & Politan, 34 Park Avenue, Lyndhurst, N.J. 07071	Law Firm	Partner	1972	Present
Textile Workers Pension Fund, 99 University Pl., NYC, N.Y.	Pension Fund	Management Trustee	1/3/78	Present
County Trust Company, 55 Park Avenue, Lyndhurst, N.J. 07071	Commercial Bank	Director	5/22/78	Present
County Trust Company, 55 Park Avenue, Lyndhurst, N.J. 07071	Commercial Bank	Chairman, Executive Comm.	4/16/80	Present
County Trust Company, 55 Park Avenue, Lyndhurst, N.J. 07071	Commercial Bank	Vice Chairman of the Board of Directors	6/19/84	Present

Part II
Compensation in Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE [x]

Source (Name and Address)	Brief Description of Duties
Examples: Doe Jones & Smith, Hometown, USA	Legal services
Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction

PREVIOUS EDITION USABLE

278-100

AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA CIRCUIT & FEDERAL CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 Eye Street, N.W.
Washington, DC 20006

BOARD OF GOVERNORS LIAISON
Sharp Whitmore
2005 Card Road
Fallbrook, CA 92028

STAFF DIRECTOR
Wantland L. Sanziel, Jr.
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5685

STAFF ASSISTANT
Diane Livingston
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5701

May 6, 1987

RECEIVED MAY 0 8 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: RODNEY S. WEBB
United States District Court
District of North Dakota

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Rodney S. Webb for appointment as Judge of the United States District Court for the District of North Dakota.

Our Committee is unanimously of the opinion that Mr. Webb is "Qualified" for this appointment.

Sincerely,

Robert B. Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

RODNEY S. WEBB

Birth:	June 21, 1935	Cavalier, North Dakota
Legal Residence:	North Dakota	
Marital Status:	Married	Betty Marie Lykken Webb 5 children
Education:	1953 - 1957	University of North Dakota B.A. degree
	1957 - 1959	University of North Dakota Law School J.D. degree
Bar:	1959	North Dakota
Military Service:	1952 - present	N. D. Army national Guard Colonel, JAG Corps
Experience:	1959 - 1981	Ringsak, Webb, Rice & Metelmann Partner
	1967 - 1974	Walsh County State Attorney (part-time)
	1975 - 1981	Municipal Judge City of Grafton (part-time)
	1972 - 1981	Special Assistant Attorney General State of North Dakota (part-time)
	1981 - present	United States Attorney District of North Dakota
Office:	Federal Building & U.S. Courthouse 655 First Avenue North Fargo, North Dakota 58108-2505 701 237-5771, ext 5671 (FTS: 783-5671)	

To be United States District Judge for the District of North Dakota

RE[illegible] 8 1987 RECEIVED MAY 1 8 1987

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Rodney Scott Webb

2. Address: List current place of residence and office address(es).

Residence: 166 Eagle Street NE
Fargo, ND 58102

Business: 655 1st Avenue North
U. S. Federal Building and Courthouse
Fargo, ND 58102

3. Date and place of birth.

21 June 1935 Cavalier, ND

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Married - Spouse: Betty Marie Lykken Webb
Spouse occupation: Homemaker

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

1953 - 1957	University of North Dakota Grand Forks, ND	B.S. Bus. Admin. (1957)
1957 - 1959	University of North Dakota Grand Forks, ND	Juris Doctor (1959)

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

August 1959 - September 1981 Private practice of law
Name of firm: Ringsak, Webb, Rice & Metelmann Law Firm
Grafton, ND 58237

Jan. 1967 - Dec. 1974 Walsh County States Attorney
Grafton, ND 58237 (Elected office)

Jan. 1975 - Sept. 1981 Municipal Judge, City of Grafton
Grafton, ND 58237 (Elected position)

Jan. 1972 - Sept. 1981 Special Assistant Attorney General
of the State of North Dakota
(Appointed position)

September 1981 - Present United States Attorney
District of North Dakota
Fargo, ND 58108
(Presidentially appointed
position)

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

North Dakota Army National Guard
Colonel, JAG Corps
September 1952 - to date 501-32-5214
Inactive status (attend 15 days annual training - no monthly drills)

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

(a) 1958 Outstanding Student - Trusts Course, University of North Dakota Law School

(b) 1958 Winner - Estate Planning Paper, Merchants National Bank and Trust Company of Fargo, ND

(c) 1959 Juris Doctor Law Degree - with honors earned through grade point average and legal writing

(d) 1960 Distinguished Graduate, Erickson Trophy Winner, Officer Candidate School, North Dakota National Guard

(e) 1970 Distinguished Service Award, Outstanding Young Man of Grafton Community

(f) 1971 Reverance of Law Award, Grafton Eagles Club

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Cass County Bar Association, Fargo, ND, Member, 1981-Present.

Walsh County Bar Association, Grafton, ND, Member 1959 - 1981, President, approximately 1968.

North Dakota Bar Association, Member 1959 - Present.

American Bar Association, Member 1959-1970, 1985 - Present.

North Dakota State Attorneys Association, Member 1966 - 1974, President 1972.

National District Attorneys Association, Member 1968 - 1974, State Director 1972.

North Dakota Criminal Justice Commission, Member 1974 - 1976.

North Dakota Supreme Court Standing Committee on Court Services Administration, Member 1978 - Present.

North Dakota Federal Practice Committee, Member 1981 - Present.

United States Attorney General's Advisory Committee of United States Attorneys, Appointed by Attorney General Edwin Meese III, Member December 5, 1985, three year term.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

Name	Address	Term	Office Held
Fargo-Moorhead Federal Executive Association	Fargo, ND	1981-Pres.	President
Grafton Jaycees	Grafton, ND	1959-1970	President
Kiwanis	Grafton and Fargo, ND	1973-Pres.	President
ND National Guard Offices Ass.	Bismarck, ND	1961-Pres.	President
Lutheran Sunset Pounders	Grafton, ND	1970-1981	President
Christian Unity Hospital	Grafton, ND	1970-1978	Vice-Pres.
American Field Service	Grafton, ND	1970-1975	President

UND Letterman Club	Grand Forks, ND	1956-Pres.	President
Walsh County Planning and Zoning Commission	Grafton, ND	1968-1974	Member
Grafton Lutheran Church	Grafton, ND	1959-1981	Chairman of Board of Trustees
Executive Council of the Eastern District of ND - American Lutheran Church	Fargo, ND	1969-1973	Member, Council
Sigma Chi Fraternity	Grand Forks, ND	1954-Pres.	Vice-Pres.
Phi Delta Phi Legal Fraternity	Grand Forks, ND	1958-Pres.	Member
Masonic Lodge	Grafton, ND	1957-Pres.	Member
Shrine	Fargo, ND	1974-Pres.	Member
Elks Lodge	Fargo, ND	1965-Pres.	Member

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the State of North Dakota
(Includes all state courts)
Admitted: 1959

Federal District Court - District of North Dakota
Admitted: 1965

Federal Circuit Court of Appeals - Eighth Circuit
Admitted: 1981

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

My writing has all been related to my work as an active practicing lawyer. These writings have been in the form of briefs and memorandum for the courts and, as such, are not generally published. A short article entitled "A Prosecutor Looks at the New Code" was published in the North Dakota Law Review in 1974.

My speeches have been directed to the courts or to local civic organizations and have always related to my work as a lawyer. I don't recall any press reports of these speeches and I don't believe any speeches have related to national policy.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. January 27, 1987.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Municipal Judge, City of Grafton, ND
January 1975 to September 1981.

I was initially appointed to the position by the City Mayor and in 1978 was elected to a four year term as Municipal Judge. The work of this office occupied approximately one day of my workweek. The court had minor misdemeanor and traffic violation jurisdiction. I resigned the position as of September 1981 to accept appointment as United States Attorney for North Dakota.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

N/A.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including

the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

(1) State's Attorney for Walsh County, North Dakota. Elected office. January 1967 to December 1974. Part-time prosecutor and legal advisor. Elected in 1966 and again in 1970 - did not run for third term.

(2) Special Assistant Attorney General of the State of North Dakota. Appointed position. January 1972 to September 1981. Part-time position appointed by the Attorney General to represent the Grafton State School.

(3) President, North Dakota State's Attorneys Association. Elected position. 1972 - 1973. State prosecutors organization. Served as legislative representative of the organization and also served as the state representative to the National District Attorneys Association.

(4) Colonel, Staff Judge Advocate - North Dakota Army National Guard. Appointed office. 1975 - 1984.

(5) Advisory member of the North Dakota Legislative Council. Appointed position. 1971 - 1976. Assigned to Judiciary B Committee, which group studied and completely revised the substantive Criminal Code of the State of North Dakota; the code was adopted by the Legislature during the 1973 legislative session.

(6) Member, North Dakota Criminal Justice Commission. Appointed position. 1974 - 1976. Appointed to the Crime Commission by the Chief Justice of the North Dakota Supreme Court.

(7) Member, North Dakota Supreme Court Standing Committee on Court Services Administration. Appointed position. 1978 to date. Appointed by the Chief Justice of the North Dakota Supreme Court.

(8) Member, Federal Practice Committee, District of North Dakota. Appointed position. 1981 to date.

(9) Member, The Attorney General's Advisory Committee of United States Attorneys. Appointed position.

Appointed by Attorney General Edwin Meese III on December 5, 1985 - three year term.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as a clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

August 1959 - September 1981 Private practice of law
Name of firm: Ringsak, Webb, Rice & Metelmann Law Firm
Grafton, ND 58237

Other members of the firm:

Elton W. Ringsak, Sr.
(Deceased 1982)

Stephen J. Rice - now continuing in private practice in Grafton, ND, in the successor firm known as Hodny, Burke & Rice Law Firm. Telephone number: (701) 352-2810

Thomas K. Metelmann - now serving as County Judge
Cavalier, ND 58220
Telephone number: (701)265-8783

Reason for leaving private practice: President appointment as United States Attorney - North Dakota.

Jan. 1967 - Dec. 1974 Walsh County States Attorney
Grafton, ND 58237 (Elected office)

Part time prosecutor and legal advisor. Elected in 1966 and again in 1970 - did not run for third term.

Jan. 1975 - Sept. 1981 Municipal Judge, City of Grafton
Grafton, ND 58237
(Elected position)

Part time municipal judge. Initially appointed to the position by the Mayor of Grafton and later (1978) was elected to the position.

Jan. 1972 - Sept. 1981 Special Assistant Attorney General of the State of North Dakota
(Appointed position)

Part time position appointed by the Attorney General to represent the Grafton State School (a state institution for the mentally handicapped) - legal representative and advisor.

September 1981 - Present United States Attorney
District of North Dakota
Fargo, ND 58108
(Presidentally appointed position)

Served as Special Assistant United States Attorney in September and October 1981 until sworn in as United States Attorney on 16 October 1981.

Narrative:

During law school, I served as a law clerk and investigator for the law firm of O'Grady & Edwards, Grand Forks, ND, working 25 - 30 hours per week. Mr. Edwards is now deceased. Mr. O'Grady is retired at Sun City West, Arizona, telephone number (601) 584-9596.

Upon law school graduation, I immediately entered private law practice with Elton W. Ringsak, Sr., at Grafton, ND. This association and partnership lasted until 1976 when Mr. Ringsak retired from law practice. Mr. Ringsak was a fully disabled war veteran who was nevertheless able to practice on approximately a half-time basis. Elton was a medically retired WWII veteran and hero who was buried in Arlington National Cemetary in 1982. He was a State Senator for several years and in 1975 was selected by President Ford as the Handicapped American. Elt was my good friend and mentor as well as law partner.

During the first six years of my association with Elton Ringsak, my personal practice was devoted to criminal defense work, probate practice, tax and real estate, as well as some civil work. The practice was typical for a new lawyer in a small farming community (Grafton is approximately 6500 population serving a rich agricultural area in northeast North Dakota). I did have several jury trials during this period including two civil trials of substance, and eight to ten criminal trials. It was during this period of time that my partner and I tried Lindenberg civil case, a significant case in the products liability field in North Dakota. My clients were primarily farmers and small businessmen.

In 1967 I began service as Walsh County States Attorney and served in this position through 1974. This position occupied approximately one-half of my practice time. The position prevented any defense work. My private practice gradually became centered on a wills, trusts, probate type practice since this work did not conflict with county legal work. I continued to maintain a civil practice. As county prosecutor I was required to make many court appearances each week including numerous bench trials on minor matters. I also represented the County in juvenile matters in district court and presented approximately 20-30 felony informations each year. (I tried 2-4 jury trials per year during this period.

In 1972 I began work as Special Assistant Attorney General representing the Grafton State School. The school provided living-caring accommodations as well as educational opportunity for 1000-1400 mentally handicapped residents. I acted as legal advisor to the Supreintendent as well as to the Business Manager and medical personnel as required. The institution was supervised by the Director of Institutions at Bismarck. During my tenure a major emphasis was placed on deinstitutionalization, which included negotiating half way house contracts. Labor problems were encountered and major efforts were made to secure federal supplemental security income support for the outpatient placement and educational program.

The law firm expanded in 1972 to include Stephen Rice. Mr. Rice began taking increasing responsibilities for work as Assistant States Attorney. The Production Credit Association for Northeast North Dakota became a major client. That organization, with headquarters at Grafton, ND, provided agricultural financing in nine counties. I served as legal advisor to several local companies (some of which we incorporated) which were primarily related to agricultural business. The main legal business continued to be from individual farmer clients.

In 1975 I was appointed a Municipal Judge of the City of Grafton. This position occupied only about one day each week of my time and allowed more time for private practice.

Elton Ringsak retired from the practice in 1976 due to deteriorating health. Mr. Thomas Metelmann joined the firm in 1976. I think it fair to characterize our law practice as being respected and successful. The practice was terminated in 1981 when I was appointed United States Attorney. Mr. Metelmann left for other business and Mr. Rice joined the successor law firm.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

The general character of my private practice was providing legal advice and legal work for individual clients. These clients were primarily farmers. I also represented county and state governmental units as well as financial institutions. The character of the law practice changed gradually, as I have explained above, but did not change dramatically until September 1981 when I was appointed United States Attorney.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

County of Walsh
State of North Dakota - Grafton State School
Production Credit Association of Grafton
Farmers and business persons of northeast North Dakota

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearance in court varied, describe each such variance, giving dates.

I have regularly appeared in the Federal District Courts of North Dakota as well as the Federal Circuit Court for the Eighth Circuit during the last five years. I have also occasionally appeared in the North Dakota State Courts.

2. What percentage of these appearances was in:

(a) Federal courts.

80%.

(b) State courts of record.

20%.

(c) Other courts.

0

(3) What percentage of your litigation was:

(a) Civil.

30%.

(b) Criminal.

70%.

(4) State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

1981 - Approximately 8 trials, 3 of which were jury trials. I acted as associate counsel in one jury case and as sole or chief counsel in all other cases. (2 week drug case)

1982 - Approximately 8 trials, 3 of which were jury trials. Acted as sole trial counsel. (Insanity defense case)

1983 - Approximately 10 trials, 3 of which were jury trials. Acted as sole or chief trial counsel.
(Major bankruptcy trial and drug trial)

1984 - Approximately 10 trials, 4 of which were jury trials. Acted as sole or chief trial counsel. (Bank robbery with insanity defense and peyote case)

1985 - Approximately 10 trials, 5 of which were jury trials. Acted as sole or chief trial counsel. (Will contest case - Farm fraud cases - Bank fraud case)

1986 - Approximately 8 trials, 2 of which were jury trials. Acted as sole or chief trial counsel. (Bank larceny case - three weeks)

(5) What percentage of these trials was:

(a) Jury.

30%.

(b) Non-jury.

70%.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Lindenberg v. Folson, 138 NW.2d 573 (ND 1965). Representation of plaintiff in personal injury case and claim against product manufacturer as well as employer. The plaintiff, a farm laborer, was severely injured while working on a mechanical potato picker. This case has been cited as establishing the rule of strict liability in products cases in North Dakota. The action was tried to a jury in Walsh County, North Dakota, over a period of two weeks in 1963; the verdict was upheld on appeal to the North Dakota Supreme Court in 1965. I argued the appeal case.

(a) Two weeks trial - 1963.

(b) District Court for Walsh County, North Dakota.
District Judge Douglas B. Heen, now retired.
Devils Lake, North Dakota 58301
Home telephone number: (701) 662-3846

(c) Co-counsel: Elton Ringsak, deceased.

Defense counsel:
(1) Robert Fair, deceased.
(2) James H. O'Keefe, District Judge
Grafton, ND 58237
Telephone number: (701) 352-1311

In Re Martin, 761 F.2d 472 (8th Cir. 1985).
This was a bankruptcy case in which I represented the Commodity Credit Corporation. Debtor requested permission to sell Commodity Credit Corporation secured grain and use cash collateral to plant crops. Bankruptcy Court granted request, Federal District Court for North Dakota reversed and the Eighth Circuit Court remanded to the Bankruptcy Court for modification.

(a) Two day bankruptcy trial followed by Appeals hearings and extensive briefing in Federal District Court and the Appeals Court in 1984 and 1985. I argued the appeal cases.

(b) Honorable William A. Hill, Bankruptcy Judge.
Federal Bldg. & U.S. Courthouse, Fargo, ND 58108
Telephone No. (701) 237-5771, Ext. 5631
FTS telephone No. 783-5671

Honorable Paul Benson, Federal District Judge
Federal Bldg. & U.S. Courthouse, Fargo, ND 58108
Telephone No. (701) 237-5771, Ext. 5661
FTS telephone No. 783-5671

(c) Co-counsel: None.

Opposing counsel: Daniel L. Wentz
500 2nd Avenue North
Fargo, ND 58102
Telephone No. (701) 293-9159

Husband v. Schulz, unreported state District Court case (1971). This jury case ivolved water rights and drainage obligations of farmers in flat farm country. The case was significant and controversial at that time.

(a) One and one-half week jury trial - about 1971.

(b) District Court for Pembina County, North Dakota
District Judge Ray Friederich, deceased

(c) Co-counsel: None

Defense counsel: Herman Weiss
200 Jamestown Mall
Jamestown, ND 58401
Telephone No. (701) 252-2090

United States v. Lee, 729 F.2d 1142 (8th Cir. 1984). As United States Attorney I represented the government in the criminal prosecution of Alf Robert Lee on an interstate transportation of stolen property or securities charge. The defendant raised the insanity defense. Nationally recognized experts on the insanity defense testified during trial. The case was significant in that it presented the most complete legal debate on the subject of criminal insanity to be heard in many years in this jurisdiction. The defendant was convicted and the verdict was upheld on appeal. I argued the appeal.

(a) One week jury trial - December 1982

(b) Federal District Court for North Dakota - Northeast Division at Grand Forks, ND.
Honorable Paul Benson, Federal District Judge
Federal Bldg. & U.S. Courthouse, Fargo, ND 58108
Telephone No. (701) 237-5771, Ext. 5661

FTS No. 783-5661

(c) Co-counsel: None

Trial defense counsel: Garry Pearson
24 N. 4th Street
Grand Forks, ND 58201
Telephone No. (701) 775-0521

Appellate defense counsel: Jonathan T. Garaas
1314 23rd Street South
Fargo, ND 58103
Telephone No. (701) 293-7211

State v. Ramon, unreported state District Court case (1969). As States Attorney I represented the state in the prosecution of this homicide case. The case was significant because of the emotion demonstrated by the families of the accused and the victim. Additionally, a threat of continued violence pervaded the preliminary proceedings and the jury trial. The defendant was convicted and, I understand, was killed in a Texas prison several years later by a member of the victim's family.

(a) One week jury trial - October 1969

(b) District Court for Walsh County, North Dakota
District Judge Glenn K. Swanson
(now a practicing attorney)
Bottineau, ND 58318
Telephone No. (701) 228-2464

(c) Co-counsel: None

Defense counsel: (1) James H. O'Keefe
(now ND District Judge)
Grafton, ND 58237
Telephone No. (701) 352-1311

(2) John F. Burke
Grafton, ND 58237
Telephone No. (701) 352-2810

United States Department of Health & Human Services v. Smith, 807 F.2d 122 (8th Cir. 1986).
Bankruptcy case. As United States Attorney I represented the Department of Health and Human Services in challenging the dischargeability of an educational loan debt which Dr. Robert Porter Smith had incurred while attending medical school. Dr. Smith sought and did receive a discharge of the debt at the Bankruptcy Court level where that Court held that the loan was to be considered a grant subject to repayment and, therefore, was subject to discharge in bankruptcy. The District Court upheld the Bankruptcy Court decision. The government appealed

to the Eighth Circuit Court of Appeals where the lower court decision was overturned and the debt held to be a non-dischargeable educational loan. I argued the appeal. I felt this to be a significant case standing for the proposition that in fairness professionals now earning large salaries should not be allowed to take improper advantage of the bankruptcy laws. In a January 21, 1987, letter of appreciation directed to the undersigned, Mr. Richard J. Riseberg, Chief Counsel of the Public Health Service, (telephone no. 301-443-2644) characterized this decision as being "important precedent" with respect to the collection efforts of the Public Health Service and National Health Service Corps Scholarship Training Program and the National Research Service Award Program.

(a) Facts presented to court on stipulation. Extensive briefs were submitted to all three courts. Appeal hearing was had in October 1986.

(b) Honorable William A. Hill, Bankruptcy Judge
Federal Bldg. & U.S. Courthouse, Fargo, ND 58108
Telephone No. (701) 237-5771, Ext. 5631
FTS telephone No. 783-5631

Honorable Paul Benson, Federal District Judge
Federal Bldg. & U.S. Courthouse, Fargo, ND 58108
Telephone No. (701) 237-5771, Ext. 5661
FTS telephone No. 783-5661

(c) Co-counsel: None

Opposing counsel: Michael O'Neel
322 5th Street North
Fargo, ND 58102
Telephone No. (701) 293-8050

NOTE: This case has received recent national notoriety in that it was reported under the "Trends in the Law" section of the March 1, 1987, issue of the ABA Journal on page 92.

In Re Miller, unreported county court case (1985). Will contest case. The decedent, Lloyd Miller, provided that the United States be the residuary devisee in his Will. The residuary estate amounted to approximately one million dollars. The decedent's competency was challenged by his brothers and sisters. Unfortunately, the evidence showed the decedent to have been quite insane at the time of the execution of the Will and the county court jury, therefore, rejected the Will for probate. I felt the case significant due to the amount of the devise which would have benefited the taxpayers and, therefore, committed time and effort to the attempt to secure probate of the Will.

(a) One week jury trial (6 person jury) - April 1985

(b) Ransom County Court (probate jurisdiction)
Honorable Bayard Lewis
Richland County Judge (sitting by designation)
Wahpeton, ND 58027
Telephone No. (701) 642-7781

(c) Co-counsel: None
Opposing counsel: Mark R. Fraase
112 N. University Drive
Fargo, ND 58102
Telephone No. (701) 235-7501

United States v. Mundt, C3-86-30, United States District Court for the District of North Dakota, Southeastern Division - 1986.
As United States Attorney I represented the government in the criminal prosecution of Loren Mundt for bank larceny. The case was tried over a three week period during which the government called 62 witnesses. The trial was interrupted when the judge received a bomb in the mail. The defendant was found guilty by jury verdict, however, the second trial judge granted a motion for acquittal following verdict. The case is presently on appeal. In addition to being long and complicated, the case is significant in that it was dramatically interrupted by the receipt of the bomb and was then continued before the same jury with a new judge. This case presented interesting and important problems to be dealt with upon continuance of a criminal trial pursuant to a Rule 25 determination of disability.

(a) Three week jury trial - August and September 1986

(b) Federal District Court for North Dakota
Southeastern Division at Fargo, ND

(1) Honorable Paul Benson, Federal District Judge
Federal Bldg. & U.S. Courthouse, Fargo, ND 58108
Telephone No. (701) 237-5771, Ext. 5661
FTS telephone No. 783-5661

(2) Honorable Patrick A. Conmy, Federal District Judge
U.S. Post Office & Courthouse, Bismarck, ND 58501
Telephone No. (701) 255-4011, Ext. 4445
FTS telephone No. 783-4445

(c) Co-counsel: Norman G. Anderson, Assistant United States Attorney, Fargo, ND
Telephone No. (701) 237-5771, Ext. 5671
FTS telephone No. 783-5671

Defense counsel: Kenneth Olson and Frank Racek
107 8th Street North, Fargo, ND 58102
Telephone No. (701) 232-4437

United States v. Cree, 778 F.2d 474 (8th Cir. 1985). As United States Attorney, I represented the government in the criminal prosecution of Patricia Cree for assault resulting in serious bodily injury (child abuse). The child victims, ages 4 years and 6 years, were unable to witness in court, however, their statements were repeated in court by a trained social worker who had interviewed the children. The social worker testimony was received in court pursuant to Evidence Rule 803(24). The jury verdict of guilty was upheld on appeal and the defendant is serving a length prison term. I argued the appeal case. The case raised significant Sixth Amendment confrontation and hearsay issues which become apparent when small children, incompetent to testify in court, are victims of crime.

(a) One week jury trial - 1984

(b) Federal District Court for North Dakota
Northeastern Division at Grand Forks, ND

Honorable Paul Benson, Federal District Judge
Federal Bldg. & U.S. Courthouse, Fargo, ND 58108
Telephone No. (701) 237-5771, Ext. 5661
FTS telephone No. 783-5671

(c) Co-counsel: Norman G. Anderson
Assistant United States Attorney
Fargo, ND
Telephone No. (701) 237-5771, Ext. 5671
FTS telephone No. 783-5671

Defense counsel: (1) Maureen White Eagle
Devils Lake, ND 58301
Telephone No. (701) 662-2114

(2) David Garcia
Devils Lake, ND 58301
Telephone No. (701) 662-3815

United States v. Hintzman, 806 F.2d 840 (8th Cir. 1986) As United States Attorney I represented the government in the criminal prosecution of Randall Hintzman for conversion of property mortgaged to a federal farm credit agency. The case was one of four farm fraud cases which I tried in 1985. The defendant presented a hardship and sympathy defense but was convicted by the jury. The guilty verdict was upheld by the Appeals Court. I argued the appeal. The case was significant in that the jury recognized the defendant's guilt in spite of the extreme financial hardship which farmers in the District are experiencing and even though the jury held some sympathy for the defendant. This case, and the series of farm fraud prosecutions, has, we believe, served to deter similar conduct in this agricultural community.

(a) One week jury trial - August 1985

(b) Federal District Court for North Dakota
Southeastern Division, Fargo, ND

Honorable Paul Benson, Federal District Judge
Federal Bldg. & U.S. Courthouse, Fargo, ND 58108
Telephone No. (701) 237-5771, Ext. 5661
FTS telephone No. 783-5661

(c) Co-counsel: Norman G. Anderson
Assistant United States Attorney
Fargo, ND
Telephone No. (701) 237-5771, Ext. 5671
FTS telephone No. 783-5671

Defense counsel: David C. Thompson
711 2nd Avenue North
Fargo, ND 58102
Telephone No. (701) 237-3071

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Decribe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Revision - North Dakota Criminal Code (1971 - 1976).

I served as an advisory member to the North Dakota Legislative Council and was assigned to the Judiciary B Committee, which group studied and completely revised the substantive criminal code of the State of North Dakota. The Code was adopted by the Legislative Assembly during its 1973 session and, pursuant to Legislative direction, enactment was delayed for a two year period during which hearings and public discussions were presented relative to the Code revision. The Committee met on a monthly basis for the first two years for approximately three days in each session and met for the last four years of the term on approximately a quarterly basis for three day sessions. The Committee consisted of about seven Legislators and six advisory members. The criminal Code was modeled after the "Federal Criminal Code" and resulted in the largest single bill ever passed by the North Dakota Legislative assembly. I was primarily responsible for lobbying the passage of the bill through the Legislature; the bill passed with only one dissenting vote of the entire Legislature. I also led public discussion groups concerning the new Code and wrote an article in the North Dakota Law Review entitled "A Prosecutor Looks at the New Code." A certain pride exists as it relates to this subject since the criminal Code, with some normal revision, remains essentially the same law as was passed by the 1973 Legislative assembly.

I regard my service to the State of North Dakota as an advisory member of the Judiciary Committee as having a significant effect on the law of the State of North Dakota, though my efforts were not court or case related. This State's criminal Code has generally received praise as being a progressive and thoughtful expression of the criminal law.

North Dakota Criminal Justice Commission (1974 - 1976).

During the early 1970s the Department of Justice, through the Law Enforcement Administration, funded projects within all states to foster a study of the criminal justice system. The North Dakota study effort was coordinated by the University of North Dakota Law School and resulted in the appointment of a 100-member "crime commission" which was formally known as the North Dakota Criminal Justice Commission.

I was appointed to serve as a member of this Commission by the Chief Justice of the North Dakota Supreme Court and served as Vice Chairman of the Courts Committee. The North Dakota crime commission was composed of a cross-section of the population of the State with approximately one-third of the membership representing the legal profession and two-thirds of the membership representing the general citizenry. The law-trained

representatives pretty generally represented all facets of law enforcement, including prosecution, defense and the courts; however, some criticism of the commission was that the citizenry group was composed primarily of business and social leaders of the State, rather than the average citizen.

From a positive point of view the crime commission did provide a well-respected vehicle through which interested leaders of the State could take a philosophical study view of criminal law and procedural problems facing the State. The commission also provided a sounding board for public opinion in this field. Finally, the work product of the crime commission has provided resource material to all branches of the State and local governments on criminal law and criminal procedural matters.

I thought it a great honor to have been selected to serve on this Committee and certainly the Commission did provide a most interesting philosophical arena for discussions relating to criminal law matters. However, I was disappointed that the non-attorney membership did not more adequately reflect minorities within our State and representatives of our group who were personally interested in resolving common problems relating to the criminal law.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

I own farm land in Walsh and Pembina Counties of North Dakota, which land is leased to tenants. The net return on this investment property varies from $5,000 - $10,000 per year. I have no part in the management of this farm property.

I am the owner of a one-half interest in a vacant business lot in Grafton, North Dakota. This 75' x 90' business lot has been leased for many years to the local Chevrolet dealer. The net rental return has averaged $1,000 per annum. I do not take any part in the management relative to the use of this business lot since the lot in investment property.

My wife and I own a 25% interest in a local commercial radio station at Grafton, North Dakota. The net return on this investment property amounts to approximately $2,000 - $3,000 per year. We do not take any part in the management of this business.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I do not believe that my ownership interests in farm real estate property and the business lot represent any potential conflicts of interest.

I do not believe that my minority ownership in the local radio station at Grafton, North Dakota, should present any conflict of interest. This same ownership interest existed at the time of my appointment as United States Attorney, and though I was counseled to resign as an officer of the corporation, I was not required to dispose of my property interest. There has been some recent interest on the part of all the station owners in sale of the entire company assets or stock, which sale would, of course, convert the asset to a liquid asset and resolve any potential conflict of interest. In any event, I plan to transfer my stock interest in the company to my spouse.

Wages are received from the Department of Army for my 15-day annual National Guard training; if continued membership in the military reserve would possibly pose a

conflict of interest, I would retire from the National Guard.

Wages from the Department of Justice would, of course, terminate upon judicial appointment and would, therefore, pose no conflict of interest. All other income I receive is from investments over which I do not exercise any management control and, therefore, I would anticipate no conflicts of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

I resigned from my former private practice (Ringsak, Webb, Rice & Metelmann Law Firm of Grafton, North Dakota) and transferred assets to a successor firm effective 1 July 1981. I was appointed United States Attorney for the District of North Dakota on 16 October 1981. I did have a written agreement with the successor law firm which generally provided for collection of legal accounts owed to me; all rights and obligations pertaining to that agreement terminated five years after 1 July 1981. The agreement was filed along with my Standard Form 278 (Financial Disclosure Report) with the United States Office of Personnel Management in 1982.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

Financial statement attached.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

RODNEY S. AND BETTY M. WEBB — May 12, 1987

ASSETS		LIABILITIES	
Cash on hand and in banks	11 500 -	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	
Listed securities—add schedule		Notes payable to relatives	
Unlisted securities—add schedule	129 000 -	Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends	4 000 -	Unpaid income tax	
Due from others		Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	112 000 -
Real estate owned—add schedule	745 000 -	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property	25 000 -		
Cash value—life insurance	5 000 -		
Other assets—itemize:			
Boat and trailer	4 000 -		
IRA - 1st Am. Bank-Rod	20 000 -		
IRA-E.F. Hutton Rod	4 000 -	Total liabilities	112 000 -
IRA-Metro & St. Bank of	8 500 -	Net worth	844 000 -
Fargo-Betty	956 000 -	Total liabilities and net worth	956 000 -
CONTINGENT LIABILITIES		**GENERAL INFORMATION**	
As endorser, comaker or guarantor	150 000 -	Are any assets pledged? (Add schedule.)	Yes
On leases or contracts		Are you defendant in any suits or legal actions?	Yes
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other special debt			

ATTACHMENT TO FINANCIAL STATEMENT

Rodney S. and Betty M. Webb — May 12, 1987

Description	Ownership	Value
UNLISTED SECURITIES:		
1. Merrill Lynch Cash Management Account	Rodney & Betty Webb	$ 28,000.
2. KGPC Radio Co. Grafton, ND (25% stock interest)	Rodney & Betty Webb	100,000.
3. Lutheran Brotherhood Money Market Account	Rodney & Betty Webb	1,000.
	TOTAL	$129,000.
REAL ESTATE OWNED:		
1. Homestead 166 Eagle St. NE Fargo, ND	Betty Webb	$140,000.
2. Lake Cottage (Maple Lake) Mentor, MN	Betty Webb	35,000.
3. Farm Land - Pembina Co., ND SE1/4 & N1/2 NE1/4-7-160-53	Rodney Webb	240,000.
4. Farm Land - Walsh Co., ND W1/2 E1/2-23-157-57	Rodney Webb	100,000.
5. Farm Land - Walsh Co., ND SW1/4-20-157-57	Rodney Webb	100,000.
6. Farm Land - Walsh Co., ND Pt. Sec. 11,14,15-157-57	Rodney Webb	120,000.
7. Business Lot - 1/2 interest 6th & Griggs Grafton, ND	Rodney Webb	10,000.
	TOTAL	$745,000.

ATTACHMENT TO FINANCIAL STATEMENT

Rodney S. and Betty M. Webb — May 12, 1987

To Whom Payable	Security	Unpaid Balance
REAL ESTATE MORTGAGES PAYABLE:		
1. Federal Land Bank	Farm Land - Pembina Co.	$13,000.
2. Federal Land Bank	Farm Land - Walsh Co. W1/2 E1/2-23-157-57	39,000.
3. John & Gaylord Gustafson Adams, ND	Farm Land - Walsh Co. Pt. Sec. 11,14,15-157-57	60,000.
	TOTAL	$112,000.

General Information - Contingent Liabilities

Rodney Webb is a guarantor-cosignor on chattel notes given to the Norwest Bank of Grafton, North Dakota, by KGPC Radio Co. which have a present balance of approximately $75,000. The other unrelated owners of all KGPC stock have also signed the notes. Additionally, all owners of KGPC stock have pledged their stock as security for the debts. These individual assurances of repayment of the corporate debt have been in existence since 1973 during which time corporate payments have been maintained in current status without the necessity of any individual performance.

Rodney Webb is a guarantor-cosignor on note given to P.C.A. of Grafton, North Dakota, by Mark Hylden of Grafton, North Dakota, which said note permits Mark Hylden to borrow up to $75,000 during 1987 for farm operating purposes. Mr. Hylden is a nephew of Betty Webb and has leased our Walsh County farm land for several years. The loan is fully secured by crop mortgage and assignment of agricultural payments.

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Generally, I subscribe to the criticism which has recently been levied at the courts and has been characterized as "judicial activism." It is my view that the courts should, by way of analogy, be the "referees" and should not be the "players." I strongly believe that judges, particularly trial judges, should adhere strictly to judicial precedent and legislative direction as the guide in handling the law matters heard by them. I do not believe that judges should be utilizing their positions to impose their own ideas of new social policies or progressive notions upon litigants or parties who appear in the courts.

I do not believe, however, that judges should withhold their own wisdom and experience when the litigants present problems which

might be aided in their solution by the judge's active involvement.

My present office of United States Attorney for the District of North Dakota has, during the recent past and continuing even now, been involved in a nationwide class action by which the Farmers Home Administration has been directed to change its policies. My personal views and the views of this office are already matters of public record and I restate these views here only because they seem appropriate to the question. I believe that the court in this case has improperly attempted to impose broad affirmative duties on the Farmers Home Administration. Though the judge was certainly well-intentioned, it seems apparent that the Legislative Branch would have been better equipped to solve the problems which the court perceived, and undoubtedly the farmers would have been better served by a Legislative enactment rather than judicial pronouncement. The Farmers Home Administration case also has demonstrated an inability of the courts to properly manage or administer its decision after imposition and has shown that the Executive Branch could better direct new governmentally imposed responsibilities.

I believe that the objection to "judicial activism" is supported by lawyers of different political persuasions and philosophies. Though I would certainly want to encourage the public utilization of the courts as an arena within which to resolve controversy, it is my view that the federal judiciary is a court of limited judicial access and that as a broad principal of federalism, expansion of the opportunity for access to the courts should be primarily at the state level.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

I have been proud during the 28 years of my legal practice to have provided pro bono legal services to the disadvantaged.

During the first six years of my legal career I did extensive criminal defense work. During this time period the State of North Dakota did not provide any compensation for lawyers representing indigent defendants except during actual court time, and then it was limited to $50 per full day of time spent. Necessarily, a great majority of the time I spent on representation of criminal defendants during this period was without compensation. It is my recollection that I was maintaining approximately 20-30 misdemeanor files and 2-5 felony files at all times during this period. At that time, it was thought to be an obligation of a

lawyer to provide free representation to indigent clients. This was an obligation which I accepted freely and with pride.

During my entire career as a lawyer I have also been a member of the North Dakota National Guard. While my active practice included public representation as a state prosecutor, municipal judge and federal prosecutor, the National Guard always provided a welcome opportunity and forum through which to offer pro bono services to the disadvantaged. During the time 1975 - 1984 I was the Staff Judge Advocate for the National Guard of the State of North Dakota; after 1984, though inactive in the Guard, I have attended fifteen days military training each year. The National Guard has been a vehicle through which I have provided many free legal services to servicemen and women as well as National Guard families. These free services have been above and beyond any obligation to the National Guard. I have drawn hundreds of wills for National Guard families without any charge. I have provided counsel for young and financially strapped Guard families during times of need. My National Guard involvement has provided me with an opportunity to aid others in legal matters without any expense to them or expectation of profit to myself.

Much of my legal practice has been involved in the field of wills and estate planning for farm families in this rural state. I have had an opportunity through church-sponsored programs to address literally hundreds of individuals concerning the subject of estate planning and wills. These sessions have been conducted without charge and in areas of the state where I would never personally benefit from any client relationship. I believe these study seminars have been helpful to farmers of the state, particularly during the recent period of financial stress on the farm.

Throughout my entire career, but most particularly during the last several years, I have been able to provide counsel to many Indian groups which I hope has been helpful to them. I have visited all of the Indian reservations within the state on several occasions. Recently I accepted the invitation of a group of Chippewa Indian parents to speak at an evening meeting at their school concerning the subject of alcohol abuse. That meeting took place on the Indian reservation approximately 250 miles from my home location. Alcohol abuse, of course, is a primarily social problem on the Indian reservations and, hopefully, I have been able to share some ideas with this band of Indians as well as others which might be helpful in attacking this problem.

96-183 0 - 89 - 7

I. BIOGRAPHICAL INFORMATION (PUBLIC)

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

All other memberships were listed on the May 14, 1987 response.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

There have been no lapses in memberships or right to practice before the courts listed on the May 14, 1987, response.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

The response herein supplements the answer given at I-12 of the Senate Judiciary Committee questionnaire dated May 14, 1987.

I have not edited any published materials. Though I have undoubtedly referred to constitutional issues in speeches I have made before the courts or to local civic organizations, I believe that any views expressed have been relatively non-controversial. I am not aware of any press reports of public speeches I have made. I have not retained copies of speeches; of course, oral statements I have made to the court in a formal setting are recorded by the court reporter, but it would be difficult to retrieve copies of this material.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

The responses herein supplement the answers provided at III-2 of the Senate Judiciary Committee questionnaire dated May 14, 1987.

A. During the mid-1970's I devoted literally scores of non-compensated hours of legal time to the assistance of the Gary Guler family.

Gary Guler was a young full-time, enlisted National Guard employee, married, with two children and living at Devils Lake, North Dakota. His wife did not work and Mr. Guler's income was only minimally sufficient to support himself and his family. He was called to support an emergency winter storm snow removal operation; while operating a Caterpillar with front-end bulldozer, the machine tipped over and Mr. Guler was severely injured when he suffocated in the snow. Though Mr. Guler survived the accident, he lost complete mentality and will live his entire remaining life without any mental function. Mr. Guler remains a full-care patient in the New Rockford, North Dakota Rest Home.

The Adjutant General of the North Dakota National Guard requested that I provide legal assistance to the Guler family. We established a guardianship for the children, counseled Mrs. Guler in the manner of maintaining accountings, appeared at several court hearings with Mrs. Guler and provided her with advice and counsel. I spent many hours beyond even any expectation of the National Guard in assistance of the Guler family. This assistance was, and still remains, as one of the most rewarding experiences in my legal career.

B. On July 31, 1965, Marvin and Donna Harlow, Grafton, North Dakota, friends of mine, were tragically killed in an auto accident. Mr. and Mrs. Harlow were survived by eleven children ranging in ages from 14 months to 14 years.

Though diminished in time required, I have provided legal services and representation to the Harlow family since 1965. Some part of the representation directly reflective of the accident claim was compensated representation; however, personal representation of the family, the solicitation of charitable funds for the support of the family, and selection of custodians for the family were non-compensated legal and personal services. I spearheaded a drive which eventually yielded approximately $75,000 in gift donations received from across the nation for the support of the eleven minor children. The gift donation fund was undiminished by any charge or expense and administered with the help of local bank personnel.

Over 250 letters were received from throughout the nation containing offers from organizations and individuals to care for the children. Some of the offers were without merit, but many were wonderfully gracious expressions of love and charity toward the family. The arrangement for the financial care of the family

was a difficult one since the decedents left no estate and since five of the children were afflicted with a hereditary disease which caused deterioration of the muscles in the extremities. The family has been supported through the reception of accident damages and charitable contributions and without the aid of any general assistance. Additionally, we were able to arrange medical care through a medical experimental grant. The children were maintained in their own home and lived about as normal a life as could be expected after the loss of their parents.

The representation of the Harlow family has and will always occupy a central part of my life; it certainly has been a rewarding and satisfying experience.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I subscribe to the proposition that a judge should not give even the appearance of impropriety in his activities and thereby should avoid memberships which may be perceived by others as detracting from the dignity of the judicial office or interfering with judicial duties. I do not expect that a judge should be isolated from the society in which he lives, but I also recognize that memberships in organizations must regularly be re-examined to determine the propriety of continued membership.

A. I have been a member of the Kiwanis organization for many years and have served as a local chapter president. I have enjoyed this social luncheon organization of business leaders. It is my understanding that the Kiwanis international organization still has a national policy of discrimination based on sex. That policy, however, has been changed by the recent Rotary case in the United States Supreme Court. I subscribe to the opinion of the Supreme Court and completely support the proposition that the Kiwanis organization can continue as a viable business leaders' organization inviting both men and women to its membership. During the spring of 1986 our local membership was polled so as to provide our delegates with advice on how they should vote on the admission of women to the organization. I publicly announced my support of the motion which would have admitted women to membership.

B. I have been a member of Masonic Bodies in North Dakota for many years. While I have not been active in this organization, I have attended one or two social affairs each year. It is my understanding that some may perceive that the Masonic Bodies discriminate in their membership based on race. I have, since receiving the Senate Judiciary Committee questionnaires, visited with local Masonic Lodge leaders concerning any racial discrimination policy of the Masonic Bodies. I have been advised that Masonic Bodies do not discriminate based on race. Though there are not many black individuals within the state of North Dakota, I have been advised that during the early 1980's the local Lodge admitted a black individual to membership and that other black individuals do hold membership within this state. Indian individuals are also active in membership within the Masonic Bodies in this state. I support a policy of encouraging interracial membership within the Masonic Bodies.

3. (Judicial Nominees Only) Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There was a selection commission consisting of the North Dakota State Bar Association Board of Governors which did solicit interviews and recommend candidates for nomination to the Federal District Court for the District of North Dakota. I did receive the recommendation of this selection commission.

The Honorable Paul Benson, Chief Judge for the District of North Dakota, announced his intention to take senior status on September 20, 1985. Within a matter of days Republican Senator from the District of North Dakota, Mark Andrews, requested that the Board of Governors of the State Bar Association of North Dakota act as a selection commission and recommend to him qualified candidates to fill the vacancy on the Federal District Court bench in North Dakota. The North Dakota Bar Association Board of Governors consists of 13 individuals, 5 of whom are officers of the Association, 7 of whom are representatives of the 7 different judicial districts of the State, and the 13th member of the Board is the Dean of the Law School of the State. The Bar Association solicited candidates for the vacancy by advertisement through the State Bar Association official publication. Approximately 15 applications were received by the Bar Association. Interviews with 13 candidates were held in Fargo, North Dakota, on December 5th and 6th, 1985. I was interviewed by the Board of Governors on December 6, 1985. The North Dakota Board of Governors selection process followed the "Guidelines for Reviewing Qualifications for Candidates for the State Judicial Office" of the American Bar Association, Judicial Administration Division. By letter dated December 8, 1985, I was advised by Bar Association President David L. Peterson that I was ". . . one of the seven persons the Board felt most qualified for the position of United States District Court Judge for the District of North Dakota". The list of 7 persons found to be "most qualified" was forwarded to Senator Andrews. Sometime after the 1st of January, 1986, Senator Andrews added two names to the list of submitted by the Bar Association. Senator Andrews forwarded the names of the 9 persons to the Department of Justice for its consideration. Initially, 4 of us included in the "most qualified" list of candidates were interviewed in Washington, D. C., by members of the Department of Justice. My interview was conducted on March 14, 1986. My interview process consisted of meeting with 7 different individuals who formed the interview team; 4 of the team members, I believe, were employed within the Office of Legal Policy, 1 was with the Civil Division, one was with the Civil Rights Division, and, finally, the Assistant Attorney General for the Antitrust Division. Approximately three or four weeks later the remaining five individuals were invited to the Department of Justice for interview. In about May of 1986 the Bankruptcy Judge of the District was selected by the Department of Justice and approved by Senator Andrews for nomination. (The Bankruptcy Judge

had not received the "most qualified" recommendation of the State Bar Board of Governors.) A Federal Bureau of Investigation and American Bar Association investigation of the Bankruptcy Judge's background was conducted during the summer and fall of 1986. In the November 1986 election Senator Andrews was defeated and the United States Senate came under the control of the Democratic party. It is my understanding, without verification, that the Bankruptcy Judge's nomination came into some question after the election as representing an individual who was perhaps too young and too inexperienced to be acceptable for confirmation. Shortly after Christmas 1986 the Bankruptcy Judge announced that the Department of Justice had withdrawn support for his nomination and he was, therefore, withdrawing his name from consideration. One January 8, 1987, I was called by the Department of Justice and told that the Department was reviewing the judicial nomination and asked if I would consider accepting the nomination if it was offered. I replied that I enthusiastically solicited the consideration of the Department and would certainly accept the nomination to the honored position of Federal District Judge. On January 15, 1987, I was again called by the Department of Justice and informed that they would support my nomination and asked my permission to proceed with a Federal Bureau of Investigation background investigation along with an American Bar Association qualifications investigation. I assented. The FBI investigation, I understand, was favorable. I was pleased to receive the unanimous qualified support of the American Bar Association Investigating Committee. On May 4, 1987, I was personally called by President Ronald Reagan, who informed me that he was nominating me for the position of Federal District Judge for the District of North Dakota. On May 14, 1987, I returned the Judiciary Committee questionnaire. On this date I will return the supplemental questionnaire of the Senate Judiciary Committee which was received on June 8, 1987.

4. (Judicial Nominees Only) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

No.

CONFIRMATION HEARING ON: FRANKLIN S. VAN ANTWERPEN, JEROME TURNER, AND BERNARD H. SIEGAN

THURSDAY, NOVEMBER 5, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Dennis DeConcini (acting chairman) presiding.

Also present: Senators Thurmond, Specter, and Humphrey.

Senator DECONCINI. The Senate Judiciary Committee will come to order.

Due to the fact that we have several colleagues here today, we will first hear from Senator Heinz and then Senator Specter and then Senator Wilson so they can go to their other meetings, if they are so inclined.

This is the nomination of Franklin Van Antwerpen, is it?

Judge VAN ANTWERPEN. Van Antwerpen, sir.

Senator DECONCINI. Thank you.

We will hear from you, Senator Heinz.

STATEMENT OF THE HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Mr. Chairman, should we proceed?

Senator DECONCINI. Please proceed.

Senator HEINZ. Mr. Chairman, first let me thank you very much for holding these hearings. They are very prompt, I might add. It has only been a few days since Frank Van Antwerpen's name has been sent to the committee by the White House, and it is indeed a privilege for me, as I know it is for my colleague, Senator Specter, who is a member of the committee, to join in introducing Judge Van Antwerpen to you.

He is, of course, the President's nominee to fill one of the three vacancies that exist on the U.S. District Court of the Eastern District of our home State of Pennsylvania.

Frank Van Antwerpen, by way of introduction, has served on the Northampton County Court of Common Pleas since 1979, when he was appointed at that time by Governor Richard L. Thornburgh. He was reelected to that position 2 years later in 1981 to fill a 10-year term.

Prior to his appointment, Frank practiced law for more than 10 years, and that practice encompassed the prosecution of minor

criminal charges as a municipal attorney, general civil practice, including plaintiffs and defendants litigation, family law, and municipal law.

I might add that Frank also served for 2 years as chief counsel to the Legal Aid Society. I believe that was a pro bono position.

Judge VAN ANTWERPEN. That was a full-time position, Senator.

Senator HEINZ. Full-time position—I correct that—handling all types of civil litigation, including bankruptcy cases and defense of civil suits.

Mr. Chairman, I would also like to point out that Frank Van Antwerpen was selected through our bipartisan merit selection commission which actively sought qualified candidates to this court, screened them very carefully, and recommends, we believe, only the very best candidates to Senator Specter and me.

Our commission, the Federal Judicial Nominating Commission of Pennsylvania, recommended Frank as being one of the very best qualified for appointment to the Federal judiciary. It is not, however, the first time that he has been recognized by a bipartisan merit selection commission.

He was similarly recommended in 1979 for appointment by a state non-partisan merit selection commission to fill a vacancy on the Court of Common Pleas. He was subsequently nominated, as I mentioned, by the governor and unanimously confirmed by the Pennsylvania State Senate.

While seeking election to a full term in 1981, he achieved a distinction that Senator Specter and I secretly hope someday to achieve, but know that we never will: he received the endorsement of both political parties in Northampton County, the Democrats and the Republicans.

Judge Van Antwerpen will, in my judgment, bring to the Federal judiciary excellent legal experience and a fine judicial temperament which has earned him the recognition from the American Bar Association of being well qualified to serve on the U.S. district court.

I am confident, therefore, for all the reasons given that he possesses all the abilities, and more, to perform the responsibilities for which the President has nominated him, and I urge the committee to act as expeditiously as it can on his confirmation.

Senator DECONCINI. Thank you, Senator Heinz, for that fine statement and endorsement of the nominee.

Senator Specter.

STATEMENT OF THE HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman. After that very erudite introduction by my colleague, Senator Heinz, no further comments are necessary, but that will not stop me from making a few. [Laughter.]

Senator DECONCINI. It has not, and I am glad that the Senator is going to give us his insight on the nominee.

Senator SPECTER. Senator Heinz and I are very proud to see Judge Van Antwerpen at this stage of this proceeding for a Federal judgeship. He is a product of merit selection, which is not easy to

come by in Pennsylvania, or really virtually any place, for that matter.

His endorsement by both political parties is a testament to his qualification. Senator Heinz has come very close to being endorsed by both political parties in some of his prior campaigns. He made that comment about Judge Van Antwerpen's unique status there.

Judge Van Antwerpen has distinguished himself as a judge on the Court of Common Pleas in Pennsylvania, has some very erudite opinions in constitutional law. He was instrumental in rewriting Pennsylvania's new domestic relations law. He comes to the Court of Common Pleas with a distinguished, diversified background as a corporate lawyer, as chief counsel on the Northampton County Legal Aid Society; has been a solicitor for a township.

With his work for the past 8 years in the State court, he is preeminently well qualified for this Federal appointment.

Mr. Chairman, I want to thank the committee and you for these prompt hearings. I chatted very briefly with Judge Van Antwerpen at lunch and said that Senator Heinz and I would be pressing for the complete process to be fulfilled, assuming committee endorsement and full Senate confirmation, so that he can take his place on a very busy court and do the very important work which lies ahead of him.

I thank you very much, Mr. Chairman.

Senator DECONCINI. Senator Specter, thank you very much.

Senator Thurmond, because we also have Senator Wilson here who wants to make an introduction, I was going to go on and let him make his introduction.

Senator THURMOND. That is fine. They are very busy.

We thank you, Senator Heinz, for coming and testifying. You have got both Senators in back of you. They are both powerful Senators. You have been appointed by the President. You have got the lion by the tail. [Laughter.]

Senator DECONCINI. We will be back with you, Mr. Van Antwerpen in just a few minutes. Thank you, Senator Heinz.

Senator HEINZ. Thank you, Mr. Chairman.

Senator DECONCINI. Senator Wilson, would you like to introduce your nominee, Mr. Siegan?

STATEMENT OF THE HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Mr. Chairman, first I want to thank you personally for the efforts that you have made to bring about this hearing, and I am particularly grateful, as is the nominee. This has been some time in coming and your personal kindness in intervening to make the hearing possible is greatly appreciated.

I know that in your case I need not really introduce the nominee. I know that you have met. I also know, Mr. Chairman, that you, as a distinguished lawyer and prosecutor from my part of the country, are well aware of the importance of the ninth circuit. It is that circuit which, in fact, serves more people and covers more territory than any other in the Nation.

I think that you and the members of the committee, Senator Thurmond, Senator Specter, and the others, are well familiar with

a record that is replete with the evidence that Bernard Siegan is a truly distinguished lawyer, a truly distinguished scholar and teacher of the law.

He presently is the Director of Law and Economic Studies at the University of San Diego School of Law. He is a constitutional law authority. In his own practice, he was a specialist in the law of real property and land use.

He has written extensively, with more books and articles than I suspect even he can remember, and has been accorded wide acclaim as a genuine scholar. I think the thing that is most impressive is that having come to my home town of San Diego after having spent his active practice in the city of Chicago, where he graduated with honors from the University of Chicago Law School, and having practiced there extensively, he was welcomed by the University of San Diego as, first, an adjunct professor, later achieving the status as the director of this special studies program.

But he has, in the course of his many, many articles, his many commentaries, his many books, impressed an entire spectrum of fellow legal scholars with his sincerity, with his acumen.

And I think what is perhaps the most extraordinary thing is that in addition to the obvious intellectual energy that has produced this prolific writing, he has also produced a deep, as well as a wide impression both among those who share his views and among those who are distinctly at variance with his views.

Perhaps I could do no better than to quote a distinguished scholar now at the Harvard Law School, Alan Dershowitz, who has written to Chairman Biden saying, and I quote:

> Although I do not always agree with Professor Siegan's approach to the Constitution, I have been intrigued by the ingenuity, consistency, and sincerity of his arguments. His commitment to liberty and his unwillingness to distinguish among types of liberty make his views appear quite conservative, but his methodology is libertarian and he seems truly dedicated to keeping government off our backs not only when property is at issue, but when any liberty is threatened by the State. My discussions with him have confirmed the impression conveyed by his writings that he is a principled and intellectually honest scholar of liberty.

I think that is a very moving and a very enviable tribute. I might say that it is merely one of many that are included in the packet which I believe to be a part of the record in possession of the committee.

Those who have served as colleagues on the faculty at the University of San Diego Law School have only the highest praise and, again, they embrace an entire spectrum of thought, but what they hold in common is a view of Bernard Siegan.

There is a marvelous consistency, I must say, to the opinions that have been sent to the committee and sent to me that confirm the impression which I have had over the many years that I have been privileged to know him since he came to San Diego in 1973.

He and I have not always agreed, which perhaps understates it. We have had some spirited debates, even publicly. But let me be perhaps the last to state orally what these gentlemen have put into writing, and that is that I have the very highest regard for Professor Siegan as a man of great mental ability, of keen intellect, of genuine intellectual honesty, and the greatest personal integrity.

His character is beyond reproach. No one has ever suggested even the slightest misconduct that would in any way suggest that he is not admirably fitted to serve on the bench.

I believe that notwithstanding the firmness of his own convictions and the strength that he possesses as an advocate, he is capable of the kind of fair-mindedness and the kind of intellectual honesty that we seek in an impartial judge, particularly at this appellate level.

I might say that I envy him the recognition accorded him. His record includes recognition as an economic expert, and two who have testified to that expertise are themselves Nobel laureates in economic science, James M. Buchanan and Milton Friedman.

But, again, I think, Mr. Chairman, not to go on at inordinate length, this is a man who is admirably suited by temperament, by intellect, and certainly by character to give distinguished service at the appellate level on a very important court where we are eager to fill a vacancy.

His services and resources are very greatly needed, and we do thank you again for your intervention.

Senator DECONCINI. Senator Wilson, thank you for the fine presentation, and I can tell the nominee, having your dedication and very candid approach towards judges is appreciated by this Senator. I think you have presented Mr. Siegan in a very professional way, and indeed I had talked to you before about him and I share your observation that he certainly is an expert in the constitutional area as an academician, and this committee will give him very careful consideration. Your endorsement is very important to this Senator.

If we have no further introductions here, we will come back to Mr. Siegan for questions and return to the normal agenda, unless Chairman Thurmond would care to do something else.

Senator THURMOND. Thank you, Mr. Chairman. I just want to congratulate Professor Siegan upon his nomination by the President. I think the President has made a wise selection, and we congratulate you for your strong support here by Senator Wilson. Senator Wilson has not been in the Senate too many years, but he has developed a fine reputation here and has great prestige. He can help you a great deal.

Thank you.

Senator DECONCINI. Thank you, Senator.

Senator WILSON. Thank you, Senator. Thank you, Mr. Chairman.

Senator DECONCINI. We will now return to Mr. Franklin Van Antwerpen. If you would come back, we will proceed with your hearing. Would you please stand and raise your right hand?

Judge VAN ANTWERPEN. Certainly.

Senator DECONCINI. Do you solemnly swear the testimony you are about to give to the committee is the truth, so help you God?

Judge VAN ANTWERPEN. Yes, sir, I do.

Senator DECONCINI. Please be seated. If you have any statement you care to open with, Mr. Van Antwerpen, please proceed, or introduce anybody that is here with you.

TESTIMONY OF THE HON. FRANKLIN S. VAN ANTWERPEN, EASTON, PA, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Judge VAN ANTWERPEN. Thank you, Mr. Chairman. My wife, Kathleen, and children, Joy, Franklin and Virginia, could not be here today, unfortunately. But I did promise my tipstaff who has been with me for many years since I appointed him 6 years ago, Mr. Tumminello, that I would introduce him, and Tony is here.

Senator DECONCINI. Very good. Thank you, sir; glad you could join us.

Judge VAN ANTWERPEN. He acts as a sort of a second father to me, an adviser.

Senator DECONCINI. I understand.

Judge VAN ANTWERPEN. It is an honor to be here, Mr. Chairman, and I appreciate the opportunity to appear before you and the members of this committee.

Senator DECONCINI. Thank you, Mr. Van Antwerpen. Let me ask you a few questions. According to your response to the committee questionnaire, you have spent the bulk of your professional career practicing and then judging in the State court system.

What has been your experience in the Federal court area, if any, and the Federal law area, if any?

Judge VAN ANTWERPEN. Prior to—of course, in the last 8 years as a State judge, none. Prior to that, I did conduct some Federal litigation, particularly as a Legal Aid attorney. I cannot say that I conducted a great deal of Federal litigation, but I did conduct it. When litigation was to be conducted by our firm, I was the man that did it, so I have had Federal experience.

Senator DECONCINI. You have appeared in Federal court?

Judge VAN ANTWERPEN. Yes, I have; yes, sir.

Senator DECONCINI. As an attorney for a client?

Judge VAN ANTWERPEN. Yes, sir.

Senator DECONCINI. In trials or just motions or hearings or——

Judge VAN ANTWERPEN. In terms of a full trial, I can think of one full-blown trial that I have appeared in.

Senator DECONCINI. In Federal court?

Judge VAN ANTWERPEN. I have certainly appeared in bankruptcy court and in motions and in things of that nature.

Senator DECONCINI. Several years ago, Mr. Van Antwerpen, in 1981, you presided over a domestic relations case in which a woman came to court under the influence of alcohol. You held the woman in criminal contempt for coming into your court inebriated and ordered her confined to prison.

The appellate court later ruled that you had exceeded your authority in imposing a criminal contempt sanction where there was no record that the woman had disrupted the court proceedings.

Could you please tell us the background and your side of that story?

Judge VAN ANTWERPEN. Well, it was a crowded courtroom, Mr. Chairman; there were many people there. She was ordered to appear to show cause why she should not be held in criminal contempt for failure to pay support, and she appeared before me. She

was unsteady on your feet. You could smell the alcohol. It was at 9 o'clock in the morning.

And the record of the case that I forwarded to one of the aides for the committee—as it so clearly shows, I said that I had committed her to prison, but I said to her, please, now, I do not want to put you into prison. I want you to go to a hospital somewhere where we can work with you to try to help you with this problem.

She refused to go into the hospital. She refused to do anything about it, and I then was in the embarrassing position of having to uphold my order. My purpose was certainly not to put her in prison, but I unfortunately found that, again, I had to uphold the court's authority.

Senator DECONCINI. I understand you have had a fair amount of experience as a draftsman of legislation.

Judge VAN ANTWERPEN. Yes, sir.

Senator DECONCINI. You drafted the solid waste law, helped draft the Pennsylvania domestic relations law, redrafted a set of municipal ordinances, just to mention a few in your background and experience.

In light of this experience, what do you see as the proper role of a judge in interpreting such legislation? For instance, should great weight be put on the legislative history?

I am not asking as to this particular legislation that might come to you, but just in general. How do you view it, having been a draftsman and craftsman?

Judge VAN ANTWERPEN. Well, in Pennsylvania the courts on the State level, in my experience, have not put great weight on the legislative intent. That appears to just be a local practice confined to the State.

I know the situation to be somewhat different on the Federal level and I am always anxious to get all the help I can get to divine the will of the Congress, sir.

Senator DECONCINI. Thank you. I have no further questions.

Senator Thurmond, any questions?

Senator THURMOND. Thank you very much, Mr. Chairman. First, Mr. Chairman, I want to congratulate you for holding this hearing. Mr. Siegan's nomination, for instance, has been here for about 9 months and I am very glad to see it acted upon and I am glad to see these others being taken up so soon. I appreciate your doing this.

Senator DECONCINI. Thank you, Senator.

Senator THURMOND. Judge, we frequently hear the argument that courts act in response to various social problems because the legislative branch has failed to act on its own.

How would you respond to this defense of an activist judiciary?

Judge VAN ANTWERPEN. Well, Senator, I am acutely aware, although I am an elected judge now, that a Federal judge is not elected; that a Federal judge is not a Senator, he is not a Congressman. I think our job is to interpret the legislation of Congress, not to make legislation.

Senator THURMOND. I am glad to hear you say that and I hope you stick by that. Some Federal judges have been very activist judges. They have taken over State prisons, State hospitals, State schools, and other State institutions.

As I construe the Constitution, the Congress makes the law, or the legislative branch makes the law; the executive branch headed by the President administers the law; the judicial branch interprets the law.

Simply because a judge feels something should be done that the Congress has failed to do is no excuse for him to do it, but a good many judges have undertaken it to themselves anyway.

Now, Judge, I consider judicial temperament to be a very important prerequisite to a Federal judge. I have heard Federal judges scream at jurors and scream at lawyers and witnesses, and there is just no excuse for that.

What is your thinking along that line?

Judge VAN ANTWERPEN. I agree. I think anyone who is vested with power has an obligation to use the power with great thought, with great restraint and, more importantly, to treat people with fairness and respect. I think that is all that most people want of a judge, for him to be fair and to treat people with respect.

Senator THURMOND. Do you not feel that the more power an individual has because of his position, the more restraint he should exercise?

Judge VAN ANTWERPEN. I think there is a great deal of truth to that, Senator.

Senator THURMOND. I think one of the greatest qualities is humility. Do you agree?

Judge VAN ANTWERPEN. Yes, sir.

Senator THURMOND. That is all the questions I have. Thank you, Mr. Chairman.

Senator DECONCINI. Thank you very much, Mr. Chairman.

Senator Specter, do you have any questions?

Senator SPECTER. Just a comment, Mr. Chairman, thank you very much.

I know Judge Van Antwerpen's record; I know Judge Van Antwerpen personally. I have already made a comment in introducing him. I think that Senator Thurmond has struck perhaps the most important chord.

I recall a question that Chairman Thurmond asked about 5 years ago when there were judges here for confirmation proceedings. He said, would you be courteous to the people who appear before you? Of course, the witness answered yes, and then Senator Thurmond said the more power a man has, the more courteous he should be.

Senator Thurmond has already covered that point today, but that is one of the best lessons I have learned here in the 7 years I have been on the Judiciary Committee.

Thank you very much, Mr. Chairman.

Senator DECONCINI. Thank you.

Mr. Van Antwerpen, we have no further questions. Thank you very much for your being with us today and your cooperation with the staff in responding to the committee's requests and the other procedures here.

Judge VAN ANTWERPEN. Thank you, Mr. Chairman.

Senator THURMOND. I hope you have a happy tenure on the bench.

Judge VAN ANTWERPEN. Thank you, sir.

Senator THURMOND. I am sure he will get you out right away. [Laughter.]

Judge VAN ANTWERPEN. Thank you.

Senator DECONCINI. Now, we will hear from Jerome Turner. Mr. Turner, would you please rise and raise your right hand, please? Do you solemnly swear the testimony you are about to give before the committee is the truth, so help you God?

Mr. TURNER. I do.

Senator DECONCINI. Mr. Turner, do you have any opening statement or care to introduce anyone who is with you?—

TESTIMONY OF JEROME TURNER, MEMPHIS, TN, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE

Mr. TURNER. Mr. Chairman, I would be most pleased to introduce to the committee my wife, Kay Luckett, and my daughter, Alex Turner. My other four children, I could not afford to bring up here from the long distance of Memphis. They are all happy and wish they were here, but these two are with me.

Senator DECONCINI. Very good.

Mr. TURNER. I only have to add to that that I am very honored to be here, to have been nominated by the President, and to have this opportunity to appear before your committee.

Senator DECONCINI. Mr. Turner, the committee has received a number of letters relating to divorce proceedings that you went through a year or so ago. I realize that these are sensitive and deal with personal feelings and emotions.

However, when we have letters brought to our attention or witnesses or statements, there is some obligation to ask the nominee about those, and you are, of course, permitted to answer or not answer, as the case may be.

I would like to pursue this a little bit, and perhaps you can explain how the proceedings of that domestic incident litigation were resolved.

Mr. TURNER. The divorce suit was a suit filed initially by my former wife and later by me. It was, after several days of ordinary trial hearings, settled midway in the process by an agreement reached between my former wife and me, both with respect to property and custody of the children and visitation.

Senator DECONCINI. I believe we have been informed, and you can verify this for us, that a substantial portion of the record in those proceedings was expunged. Is that correct, and if so——

Mr. TURNER. Mr. Chairman, after the settlement was reached and after a consent decree with respect to the property settlement and custody and visitation was signed by the judge and filed in the record, a partial transcript of my testimony and a partial transcript of the testimony of my former wife, not a full transcript, was filed.

There was no reason for it to have been filed and there was no use for it. It was, by the agreement, again, of my former wife and me, and by the judge's order, returned to the attorney who had filed it.

Senator DECONCINI. And as part of that agreement, it is agreed, is it correct, that neither one of you would make any statement regarding your divorce proceedings?

Mr. TURNER. No, sir, it is not quite that broad. There was an agreement between us that neither of us would disparage the other.

Senator DECONCINI. And does that include a prohibition of anyone talking to your former wife regarding your background? And I do not mean regarding the divorce proceedings; it would be regarding your background.

Mr. TURNER. Well, certainly not in my view, and if there is any need for me to participate in explaining that or telling her of my view about that, I would be happy to.

Senator DECONCINI. I do not know that the staff or the committee is going to want to do that, but would you have any objections if your wife was interviewed, and if she indicated at that inquiry or that interview that she felt bound or her counsel felt bound under an obligation from the divorce proceedings not to be interviewed or discuss you in any way, would you release her from that?

Mr. TURNER. I have already done that on one occasion and I would be happy to do it at any time.

Senator DECONCINI. I am not certain that that is going to be necessary, but I am pleased that you are willing to do that. And I want the record to show this is not an attempt to find out the details of the differences with your wife, but how long were you married to your first wife?

Mr. TURNER. We were married 15 years at the time we separated.

Senator DECONCINI. And that speaks for itself, that sometimes those backgrounds are important to understand who is the nominee who is before us.

In your response to the committee questionnaire, Mr. Turner, you indicated that your principal pro bono activities have been through your involvement in the Memphis and Shelby County Bar Association.

Have you yourself handled any cases on behalf of indigents?

Mr. TURNER. I have handled cases early in my career when I was requested to by judges or in one instance by my former criminal law professor at Washington and Lee. A young lady was on an indeterminative sentence and it appeared at that point in his mind that she was at a stage where she probably ought to be released, and I handled that at his request and was successful in obtaining her release.

In the last 6 years, all of my spare time, if I can call it that, in the legal area has been spent in the bar association work. I am now president-elect of the Memphis and Shelby County Bar Association, which is approximately 1,400 lawyers, and in order to get there, I have had to serve as director, treasurer, secretary, vice president, and so on.

Senator DECONCINI. And the pay is minimal or nothing, is that correct?

Mr. TURNER. Very minimal, very minimal.

Senator DECONCINI. Now, Mr. Turner, now your practice is primarily civil law, is that correct?

Mr. TURNER. Yes, sir.

Senator DECONCINI. In that area of the law, have you done some pro bono work for clients or associations or something that you would care to discuss?

Mr. TURNER. I think all lawyers, Mr. Chairman, from time to time get called on to do that. I certainly have done work for people that could not afford to pay what I would normally charge as a lawyer, and I have done that throughout my career.

Senator DECONCINI. In your response to the committee's questionnaire, you listed a case by the name of *Williams* v. *Bonner* as one of your ten most significant litigated matters, mentioning the speed in which the presiding judge handled the case.

Mr. TURNER. Yes, sir.

Senator DECONCINI. You stated, quote, "It taught me how quickly a judge can move a case if he goes forward with that goal." As a district judge who will have a very busy court, what is your goal in processing cases before you?

Mr. TURNER. Well, even as this Congress has seen fit to set up speedy trial laws, I too agree that justice can only be meted out if it is done so promptly. It is my view that if a judge can speed a trial along, and I am certain that a judge can do so, that he ought to do so.

That particular instance you mentioned was a wrongful death case of some serious nature, and yet we were able to dispose of the entire trial in less than 5 hours, which was somewhat of a shock to me.

Senator DECONCINI. A lot of that had to do with the way the judge moved the case along?

Mr. TURNER. The judge started at 9 o'clock and when we got long-winded, he told us we were getting long-winded and we went forward.

Senator DECONCINI. Thank you, Mr. Turner. I have no further questions.

Chairman THURMOND.

Senator THURMOND. Mr. Turner, speaking of your marriage settlement, I do not want to go into that, but you were married once and were divorced?

Mr. TURNER. Yes, sir.

Senator THURMOND. Now, this is your second wife here?

Mr. TURNER. Yes, sir.

Senator THURMOND. Is this your daughter by your first or your second wife?

Mr. TURNER. By my first marriage, first wife.

Senator THURMOND. I did not know your first wife, but you seem to have done very well.

Mr. TURNER. I think so, too. [Laughter.]

I wish you could see the other.

Senator THURMOND. And you have a beautiful daughter.

Mr. TURNER. Thank you, sir.

Senator THURMOND. Now, do you feel that a district court judge should assume direct control over complex issues and cases in order to avoid delays and to effectively manage such cases?

Mr. TURNER. I am sorry, Senator. I could not quite hear the question.

Senator THURMOND. Do you feel that a district court judge should assume direct control over complex cases and issues in order to avoid delays and to effectively manage such cases?

Mr. TURNER. I think that one of a judge's primary duties is to get his cases to trial, and in order to do that he has to manage the pretrial procedures in order to bring the lawyers and the parties into the courtroom for trial, yes, sir.

Senator THURMOND. Mr. Turner, there is frequently a conflict between the deeply-felt constitutional views of a Federal judge and the constraints of judicial precedent. How would you resolve the tension between personal jurisprudence and precedent?

Mr. TURNER. There is undoubtedly, Senator, a tension there. However, I think a Federal judge or any other judge, for that matter, in our system has an obligation to follow the cases that have gone before him within his jurisdiction.

I think if the sixth circuit, in my instance, or the Supreme Court of the United States has ruled and I am lucky enough to be confirmed, then I am constrained to follow their rulings. I do not think I have the right or the authority to interject my personal feelings into such decisions in light of the clear decisions by the sixth circuit or the Supreme Court.

Senator THURMOND. In other words, you feel you would follow stare decisis?

Mr. TURNER. Yes, sir, very definitely. I think it is the backbone of our rule of law system.

Senator THURMOND. I have no other questions. I hope you have a happy tenure of service on the bench.

Mr. TURNER. Thank you, Senator.

Senator DECONCINI. The Senator from New Hampshire.

Senator HUMPHREY. No questions. Thank you.

Senator DECONCINI. Thank you very much, Mr. Turner.

Mr. TURNER. Thank you, Mr. Chairman.

Senator DECONCINI. We appreciate your cooperation.

We will now have Mr. Bernard Siegan, if you would please come forward and raise your right hand. Do you swear the testimony you are about to give before the committee is the truth, so help you God?

Mr. SIEGAN. Yes, sir.

Senator DECONCINI. Please sit down. Mr. Siegan, if you have any opening statement or introductions you care to make, please proceed.

TESTIMONY OF BERNARD H. SIEGAN, LA JOLLA, CA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. SIEGAN. Mr. Chairman, I have no opening statement. I want to express my appreciation to you for obtaining this hearing and I hope the hearing process will terminate in short order.

Senator DECONCINI. Mr. Siegan, I found your nomination to be disturbing to me, as I shared with some of my colleagues before, because of the length of time, and it was difficult to nail down why, although as we proceed with going through the questionnaire, which I have done, I think one of the troublesome questions is the

question of experience. To me, that is a very fair area to pursue and I am going to ask you some questions on that.

Let me ask Senator Wilson if he would like to join us up here on the dias. We would be glad to have him.

Senator WILSON. Thank you, Mr. Chairman. I am going to have to leave shortly.

Senator DECONCINI. Very good.

Mr. Siegan, in response to the committee questionnaire section on your legal experience, you said that almost all of your court appearances were in State court. I would like to pursue this a little bit and just be sure that I have it on the record correctly.

Have you appeared in any Federal courts either in Illinois or any other State, or in California, the ninth circuit or otherwise?

Mr. SIEGAN. Yes, but not to any significance. I appeared in Federal court——

Senator DECONCINI. Can you pull that mike a little bit closer?

Mr. SIEGAN. I appeared in Federal court when I worked for a law firm shortly after leaving law school and I——

Senator DECONCINI. How about since you moved to California?

Mr. SIEGAN. No, I have not.

Senator DECONCINI. Have you appeared in the ninth circuit or any of the district courts there?

Mr. SIEGAN. No, sir.

Senator DECONCINI. Have you practiced any law since you moved out of Illinois?

Mr. SIEGAN. No, I have not, but I have been very much engaged in the law. I have been doing research, teaching. My life has been spent in the law even to a greater extent since moving than before I moved.

Senator DECONCINI. When was the last time you appeared in a Federal court, then, in Illinois? Do you recall?

Mr. SIEGAN. In possibly 1952; 1951. I would guess that would be it.

Senator DECONCINI. And have you participated in any judicial conferences, any Federal judicial conferences, as a professor or a lawyer, or Federal bar association seminars, or as a panelist or anything along that line?

Mr. SIEGAN. I have appeared in many conferences. I have organized conferences in which the subject matter was law related to Federal matters or to State matters.

Senator DECONCINI. Have you appeared at any judicial conferences, Federal judicial conferences?

Mr. SIEGAN. Not in those terms. The conferences I am talking about are largely academic conferences.

Senator DECONCINI. Academic conferences dealing with Federal law?

Mr. SIEGAN. Well, dealing with constitutional law, dealing with zoning law, dealing with issues that unquestionably relate to Federal matters.

Senator DECONCINI. Have you taught any courses for Federal judges, Federal prosecutors, or Federal officials?

Mr. SIEGAN. No, I have not.

Senator DECONCINI. In your course, have you been asked to write any writings for them, any articles for the judiciary or for the prosecutors association or anything like that?

Mr. SIEGAN. No, but I have spoken to judges about various matters concerning constitutional issues and I have, of course, written on many constitutional issues.

Senator DECONCINI. Let me ask you about some of your litigation experience in other courts. You indicate that you have handled cases—since you retired that you have not handled any cases. You did practice in law in Chicago for more than 20 years, and apparently you were a member of a law firm there, as well as in private business.

To what extent did that law firm bring about litigation, or what type of practice can you tell us for the record that your law firm was involved in and you were involved in?

Mr. SIEGAN. Well, the law firm was Siegan and Karlin, which I was involved with beginning in 1952 and terminated in 1973; was largely involved in real estate law, almost all aspects of real estate law.

Senator DECONCINI. Did that include litigation?

Mr. SIEGAN. To some degree, and I have listed the litigation on the form.

Senator DECONCINI. I noticed that you listed the ten most significant litigation matters which you personally handled. Most of them—well, all of them, I think, were in connection with real estate development. I would like to know a little bit more about that.

If you could, can you tell us a little bit about, say, the case *Cosmopolitan National Bank* v. *Village of Skokie*?

Mr. SIEGAN. Well, that was a zoning case in which the municipality's ordinance prohibited the erection of two-family and multifamily dwellings. The suit was to the effect that that restriction was unconstitutional. The court so held and lifted that restriction.

Senator DECONCINI. Were you merely a lawyer for a client or did you have an interest in this?

Mr. SIEGAN. No. I had both an interest in the property and I was also the attorney in the case.

Senator DECONCINI. And you succeeded in the case. And did you argue the case?

Mr. SIEGAN. Yes, I did.

Senator DECONCINI. And was it a jury case?

Mr. SIEGAN. No, it was not.

Senator DECONCINI. Just before the judge?

Mr. SIEGAN. It was summary—we sought a summary judgment before the judge and the judge granted summary judgment.

Senator DECONCINI. And the judge granted the summary judgment.

How about *Guarantee Bank and Trust Company* v. *Beardsley*?

Mr. SIEGAN. That was an instance where property was restricted to cemetery use. No bodies had ever been buried in the ground, and we sought to buy—"we," meaning I as an individual, along with other people, sought to buy that property.

The property could only be utilized if those restrictions were removed. We sought to remove those restrictions through court pro-

ceedings. The court agreed and lifted the cemetery restrictions, enabling the property to be developed for homes.

Senator DECONCINI. And you represented the bank or did you represent Beardsley?

Mr. SIEGAN. Well, I represented the bank as trustee. I had no interest whatever in the trust. I had interest only with the buyer, but the agreement understood that we would press the proceeding.

Senator DECONCINI. Then in the case of *Petition to Annex Certain Territory to the Village of Mount Prospect,* can you tell us what your legal involvement was in that case?

Mr. SIEGAN. What page is that, sir?

Senator DECONCINI. I do not know what page it is. It is the case *Petition to Annex Certain Territory to the Village of Mount Prospect.* I think it may be listed as number four of the ten active cases that you——

Senator THURMOND. Page 17.

Senator DECONCINI. It is page 17. Thank you.

Mr. SIEGAN. Well, that was an instance where we responded to a petition filed to annex certain properties to Mount Prospect. We represented LaSalle National Bank as trustee, which, had the annexation been effected, would have been surrounded and would, in time, have been annexed automatically to Mount Prospect.

Our client did not want to be annexed to Mount Prospect. Our client sought to be annexed to the adjoining village of Arlington Heights. It was——

Senator DECONCINI. You argued that case before the court?

Mr. SIEGAN. Yes, I did.

Senator DECONCINI. And the court—you did not do so well in that one, but I understand those.

Mr. SIEGAN. It was not necessary. We actually——

Senator DECONCINI. I have had a few of those.

Mr. SIEGAN. Pardon me?

Senator DECONCINI. I have had a few of those, too. The court overruled your position, or what?

Mr. SIEGAN. Yes, but what actually happened is Arlington Heights proceeded to annex the property and as far as we were concerned that was the end of the case.

Senator DECONCINI. That was the objective in the case originally?

Mr. SIEGAN. Yes, to prevent the property from being involuntarily annexed to Mount Prospect, and the——

Senator DECONCINI. What about the next case, *People* v. *Village of Wheeling*?

Mr. SIEGAN. Two villages were involved. Our client—I had no interest, no personal interest in this whatever except as a lawyer. Two villages sought to obtain incorporation of certain property. Our client wanted to go with one village. We succeeded in his objective.

Senator DECONCINI. And you represented——

Mr. SIEGAN. I represented the client. I never filed anything of record. This——

Senator DECONCINI. You did not file?

Mr. SIEGAN. No, except I did——

Senator DECONCINI. Your client was Zale Construction Company?

Mr. SIEGAN. That is correct, and——

Senator DECONCINI. And your firm represented Zale?

Mr. SIEGAN. Yes, we represented Zale on a retainer for a lengthy period of time.

Senator DECONCINI. And did you argue that case?

Mr. SIEGAN. I did not—I cannot really remember. I know I was very much involved in that because we had a great interest in that, and I may have entered some oral effort, but I do not remember. But I know that I was very involved in negotiations.

Senator DECONCINI. Your colleague, Alvin Kornfeld, he would have been the main lawyer there?

Mr. SIEGAN. He was not—he was a colleague in the case. He was also very involved with the very same objective. This was largely a question of trying to work out a solution, not necessarily through court process, but through negotiation.

Senator DECONCINI. Then there is the case of *Oak Park National Bank* v. *the Village of Bensenville.*

Mr. SIEGAN. That was an instance where we—and when I say we, as a land developer—sought to obtain rezoning of property for the development of townhouses.

Senator DECONCINI. This was your interest as well?

Mr. SIEGAN. It was the interest of a corporation in which I had a substantial interest.

Senator DECONCINI. And did that case go to court?

Mr. SIEGAN. Yes, it did, and we succeeded. We obtained a decree of court rezoning the property to allow for the erection of townhouses.

Senator DECONCINI. That was a trial just before the court?

Mr. SIEGAN. Yes, it was a trial. It was by agreement. At a certain point, as I remember, an agreement was entered into with the Village of Bensenville as to the erection of a certain number of townhouses.

Senator THURMOND. Mr. Chairman, will you excuse me a minute?

Senator DECONCINI. Yes. I will be happy to yield to the Senator.

Senator THURMOND. I have an emergency and I have got to go to the Capitol.

Senator DECONCINI. Sure.

Senator THURMOND. I have a few questions. If you would propound those, Mr. Chairman, I would appreciate it.

Senator DECONCINI. I would be glad to let you ask any questions.

Senator THURMOND. And I would like to place in the record a list here of Professor Bernard Siegan's endorsements. If you would just read those in the record for me, I would appreciate it very much.

Senator DECONCINI. Without objection——

Senator THURMOND. I have had the pleasure of serving with Professor Siegan on the Constitutional Commission celebrating the 200th anniversary of the Constitution, and I just want to say I have been very much impressed with him and I think he is an able lawyer, and it will be my pleasure to vote for your confirmation.

Mr. SIEGAN. Thank you, sir.

Senator DECONCINI. Thank you. Without objection——

Senator THURMOND. And with this able Chairman here, I am sure he will get these judges out right away.

Senator DECONCINI. Without objection, the list submitted by the Senator from South Carolina will appear in the record. Professor Siegan, I will submit to you at the close of this hearing questions that you can answer for the record from Senator Thurmond.

[Aforementioned material follows:]

PROFESSOR BERNARD SIEGAN

Professor Arthur Brody
(Southwestern University Law School, June 30, 1987)
Professor James M. Buchanan and Milton Friedman
(Nobel Laureates in Economic Science)
Professor Alan Dershowitz
(Harvard Law School, May 21, 1987)
Milton Freeman, Esq., Attorney at Law
(Arnold & Porter, Washington, DC, June 12, 1987)
Ernest Gellhorn, Esq., Attorney at Law
(Jones, Day, Reavis & Pogue; Former Dean Case Western Reserve University Law School, March 26, 1987)
Dean Sheldon Krantz,
(Dean at University of San Diego Law School since 1981, June 19, 1987)
Professor Philip B. Kurland
(University of Chicago Law School, June 5, 1985)
Professor Julian Levi
(Hastings College of the Law, May 6, 1987)
Mr. John McClaughry
(President, Institute for Liberty and Community, March 10, 1987)
Professor Grant Morris
(Acting Dean at University of San Diego Law School 1977-78, March 19, 1987)
Professor Michael Navin
(Assoc. Dean at University of San Diego Law School 1978-81, April 6, 1987)
Michael Pancer,Esq.
(Pancer & Sherman, May 14, 1987)
Marilyn Riley, Attorney at Law
(Senior Consultant, California Senate Select Committee on Family Equity, July 8, 1987)
Professor Virginia Shue
(Assoc. Dean at University of San Diego School of Law 1981-82, May 28, 1987)
Jack M. Siegel, Esq., Attorney at Law
(Siegel & Warnock; Corporation Counsel, City of Evanston, IL, June 15, 1987)
Professor Robert L. Simmons
(University of San Diego Law School; Chairman, San Diegans for an Independent Judiciary; Democratic Candidate for Congress, 1984 General Election, July 6, 1987)
Professor Donald Weckstein
(Dean at University of San Diego Law School 1972-81, June 19, 1987)
Professor William Wang
(Hastings College of the Law, July 10, 1987)
Professor Richard Wharton
(Director, University of San Diego Environmental Law Clinic, June 25, 1987)

SOUTHWESTERN
UNIVERSITY
SCHOOL OF LAW
1911-1986

June 30, 1987

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

RE: BERNARD SIEGAN

Dear Senator Biden:

As Mr. Siegan's and my career paths have been crossing for more than forty years, I feel that I am in a unique position to comment on his qualification for high judicial office. I recommend him without hesitation or reservation, and I am pleased to do so.

Mr. Siegan and I first met in the early 1940's when we were both students at Marshall High in Chicago and both of us were involved in student government matters. We became friendly then, and have been on a cordial basis ever since, although we are not close friends who see one another frequently.

Our next contact was in September, 1943 at Camp Maxey, Texas. We were both in military service and had been sent to Camp Maxey for processing and shipment to the army college training program. We were assigned to work together as janitors for several of the post movie theaters. Not a bad detail as those things went, and we would reminisce afterwards about our boss, a Corporal Page.

We met again after the war at the University of Chicago. Indeed, it was Mr. Siegan's enthusiasm there for the law that influenced my own decision to go to law school. After that, we occasionally met as practicing attorneys in the Chicago area, particularly during one period during the late 50's or early 60's when I was an officer in a Skokie home-owners' group and Mr. Siegan represented clients interested in real estate development there. In recent years both Mr. Siegan and I have, coincidentally, become law professors in Southern California, he in San Diego, I in Los Angeles. We happened to meet once recently, in 1985 or 1986, when he was visiting Los Angeles.

On the basis of the foregoing, I would assert that I know Mr. Siegan fairly well. Among his many good qualities are three that are outstanding and that, in my opinion, eminently qualify him for the post for which your committee is considering him. Those three qualities--and I deliberately give them capital letters--are Integrity, Resourcefulness and Intellect.

I have never known, nor heard of any instance, of Mr. Siegan going back on his word. Even in high school, he had that basic responsibility of character that made him never to promise what he could not deliver. That says a great deal, I believe, about a person, especially when one considers what immature high schoolers will do to gain popularity.

As to his Resourcefulness, I have found over the years that Mr. Siegan has a capacity for devising innovative solutions to problems and for finding just those steps that are most appropriate for achieving those solutions. On reflection, that is the sort of bent of mind that we want from judges on a high appellate court.

I am sure that you have been furnished abundant evidence of Mr. Siegan's intellectual credentials, so I need not supply any here. I should say that, although he is both learned and intelligent, I have to consider Mr. Siegan misguided in some of his notions. My practice has involved a fair amount of administrative law work, and my political philosophy leans to the New and Fair deals and the enlightened pragmatism we knew during an era some now call "Camelot," so I do not hold the preference for deregulation and market solutions that Mr. Siegan has. Nevertheless, I find comfort in three observations concerning Mr. Siegan's philosophical predilections: the man is honest; the man is smart and can learn; and maybe my own philosophy does not have a hundred percent of the truth.

As a lawyer and thus an officer of the court, I would feel our legal system is well protected with a judge like Bernard Siegan on the bench.

Sincerely,

Arthur Brody,
Professor of Law
Southwestern University
School of Law

AB/sjm
cc: Honorable J. Strom Thurmond

CENTER FOR STUDY OF PUBLIC CHOICE
St. George's Hall

(703) 323-3774

George Mason University
4400 University Drive
Fairfax, Virginia 22030

Senator Joseph R. Biden, Jr.
Chairman, Senate Judiciary Committee
489 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I am writing to endorse the judicial nomination of Professor Bernard Siegan, University of San Diego Law School.

I know Professor Siegan personally, and I am also familiar with his work. He is an outstanding legal-constitutional scholar, whose work reflects a fine basic understanding of the American legal structure. He would be a credit to the judiciary.

Sincerely yours,

James M. Buchanan
University Distinguished Professor
and General Director
(Nobel Laureate in Economic Science, 1986)

Milton Friedman
Senior Research Fellow
Hoover Institution (Stanford, CA)
(Nobel Laureate in Economic Science, 1976)

/bht
cc: Senator Strom Thurmond

Alan M. Dershowitz
Harvard Law School
Cambridge, Massachusetts 02138
617-495-4617

May 21, 1987

Senator Joseph R. Biden, Jr.
Russell Senate Office Building, SR-489
United States Senate
Washington, D.C.
20501

Dear Senator Biden,

I am advised that the Senate Judiciary Committee is considering the President's nomination of Professor Bernard Siegan to the United States Court of Appeals for the Ninth Circuit. Although I do not always agree with Professor Siegan's approach to the Constitution, I have been intrigued by the ingenuity, consistency and sincerity of his arguments. His commitment to liberty and his unwillingness to distinguish among types of liberty make his views appear quite conservative. But his methodology is libertarian, and he seems truly dedicated to keeping government off our backs not only when property is at issue, but when any liberty is threatened by the state. My discussions with him have confirmed the impression conveyed by his writings, that he is a principled and intellectually honest scholar of liberty.

If the judiciary were to be dominated by any one approach -- whether it be that of Professor Siegan or anyone else -- there might be cause for concern. But his are indeed iconoclastic views, not widely shared by judges and academics. Some of my friends and colleagues argue that Professor Siegan should not be confirmed precisely because his views are not mainstream. I believe that there is room in the judiciary for a wide array of acceptable views. Indeed, I do not believe that any single orthodox view of Constitutional adjudication should be deemed the established or mainstream one, so long as the nominee has a commitment to protecting liberty and individual rights. I am confident that Professor Siegan fits comfortably within this criterion.

There can be little doubt that Professor Siegan is a brilliant scholar and a person of high energy and enthusiasm about his work.

It would be a mistake, in my view, to single him out for partisan opposition because the end result of his libertarian philosophy may be judicial decisions that are sometimes conservative in outcome and favorable to property rights. I suspect that his philosophy will also produce decisions favorable to personal rights. But on a more fundamental level, any opposition to Professor Siegan would have to focus on his somewhat controversial philosophy of liberty, and that would contribute to a dangerous precedent.

Please feel free to call or write me for any further elaboration of these views.

Sincerely,

Alan M. Dershowitz

ARNOLD & PORTER
1200 NEW HAMPSHIRE AVENUE, N. W.
WASHINGTON, D. C. 20036
(202) 872-6700
CABLE: "ARFOPO"
TELECOPIER: (202) 872-6720
TELEX: 89-2733

1700 LINCOLN STREET
DENVER, COLORADO 80203
(303) 863-1000

900 THIRD AVENUE
NEW YORK, NEW YORK 10022
(212) 593-2772

MILTON V. FREEMAN
DIRECT LINE: (202) 872-6896

June 12, 1987

By Hand

Honorable Joseph R. Biden, Jr.
Chairman, Senate Judiciary Committee
Russell Senate Office Building
Room 489
Washington, D.C. 20510

Dear Senator Biden:

I make this statement in support of the confirmation of Professor Bernard Siegan to the position for which he has been nominated as a Judge of the United States Court of Appeals for the Ninth Circuit.

I have known Professor Siegan for a period of eight years. I first met him when I was a Visiting Scholar at the University of San Diego School of Law where he is a Distinguished Professor of Law. I spent the months of January to April 1979 at the University of San Diego during a sabbatical from my law practice and I got to know Professor Siegan very well. I regard him as a good friend. I have discussed with him various aspects of the law. I have also read a number of his articles and other writings.

It is clear to me that Professor Siegan is an able, indeed a distinguished scholar, a careful student of the law and a man who makes his own independent judgments in a calm and judicial manner. He listens most carefully to the views of others and is open in discussions. He is an open, friendly and compassionate person, and I would trust him to do justice fairly and according to law in any matter that came before him.

While I myself grew up in the liberal traditions of the New Deal and find Professor Siegan's views, particularly on rights of property, at variance with my own at some points, I have no question that his views are well within the spectrum of the mainstream of American law.

ARNOLD & PORTER

Indeed a decision yesterday by a broad spectrum of the Supreme Court Justices on the doctrine of eminent domain under the Fifth Amendment is closer to Professor Siegan's views than they are to my own.

But whether he is right or wrong on any subject is beside the point. He possesses in a high order the qualifications of legal skill and judgment necessary for the office for which the President has nominated him.

The American Bar Association, after its usual careful examination, has found him qualified for this position, the highest ranking normally given to nominations of persons holding academic positions.

As a statement of my own background, I am a senior partner of the law firm of Arnold & Porter in Washington, D.C. I have practiced law for over fifty years and have appeared before a great many judges in courts at every level. I believe that I have sufficient knowledge and background to make the statement that I do, namely that Professor Siegan is indeed qualified, I would say well qualified, to sit on the Ninth Circuit, and that I would have confidence in his character, his integrity, his humanity and his level of skill and judgment to do justice at the highest level.

I am taking the liberty of sending a copy of this letter to Senator Thurmond.

Very truly yours,

Milton V. Freeman

JONES, DAY, REAVIS & POGUE

AUSTIN
CLEVELAND
COLUMBUS
DALLAS
LONDON
LOS ANGELES
NEW YORK
PARIS
RIYADH

(BURREY & MORSE)
METROPOLITAN SQUARE
655 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005-5701

TELEPHONE: 202-879-3939
TELEX: DOMESTIC 892410
TELEX: INTERNATIONAL 64283
CABLE: ATTORNEYS WASHINGTON
TELECOPIER: 202-466-8648
WRITER'S DIRECT NUMBER:

(202) 879-3787

890200-202-001
7240:pmh:1312Z

March 26, 1987

The Honorable Joseph R. Biden
United States Senate
489 Senate Russell Building
Washington, D.C. 20510-0801

Dear Senator Biden:

As one who is familiar with Professor Bernard Siegan's scholarship, I am pleased to write you supporting his nomination to the 9th Circuit. I became familiar with his work while serving as a law professor at the University of Virginia and dean of the law school at Case Western Reserve University.

Professor Siegan is a careful and thoughtful scholar whose writings in Constitutional Law and Law and Economics have earned him an envied reputation. He is a person whose intellectual ability and character are highly regarded. In my view, his record entitles him to support and confirmation as a member of the U.S. Court of Appeals for the 9th Circuit.

I therefore am pleased to join with many others, including Dean Donald T. Weckstein and Dean Sheldon Krantz of the University of San Diego Law School, in endorsing his candidacy. If I can provide further information, please do not hesitate to contact me.

Sincerely,

Ernest Gellhorn

Ernest Gellhorn

bcc: Ms. Laura Nelson ✓
Office of Legislative Affairs
Department of Justice

University of San Diego

School of Law

Office of the Dean

June 19, 1987

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Biden:

I am writing in support of the nomination of Professor Bernard Siegan for appointment to the Ninth Circuit Court of Appeals. I support his appointment with great enthusiasm.

Professor Siegan is currently a Distinguished Professor of Law at the University of San Diego. He is an excellent teacher, one who is extremely popular and highly respected by both students and fellow colleagues.

As Professor Siegan's Resume indicates, he is a very highly regarded constitutional law scholar. His list of publications is impressive and includes the highly acclaimed book on Economic Liberties and the Constitution. Professor Siegan is understandably in demand as a speaker on constitutional law issues throughout the country. He has a perspective on constitutional interpretation that is deserving of national attention. Despite his extremely busy schedule, Professor Siegan finds time for a great deal of public service. He has, for example, in recent years served on the President's Commission on Housing and is currently a member of the President's Commission on the Bicentennial of the United States Constitution.

Professor Siegan's professional achievements only reflect one of the reasons why he is an outstanding candidate for appointment to the Ninth Circuit Court of Appeals. Along with being a true scholar of the law, he is a warm, easily accessible person who is liked and respected by everyone. He is extremely hardworking and highly principled and would be a superb colleague for the other members of the bench.

Although I would feel a great sense of loss in having Professor Siegan leave our faculty and his departure would certainly create a void, I would rejoice in his appointment. I have the greatest admiration and respect for Bernard Siegan.

Sincerely,

Sheldon Krantz, Dean

SK:sc

Alcalá Park, San Diego, California 92110 619/260-4600

96-183 0 - 89 - 8

University of San Diego SCHOOL OF LA

May 24, 1985

Mr. Grove Reese
Special Assistant to the Attorney General
Room 5123, U. S. Department of Justice
10th and Constitution, NW
Washington, D.C. 20530

Dear Mr. Reese:

I have just learned that Professor Bernard Siegan is being considered for appointment to the Ninth Circuit Court of Appeals. I support this appointment with great enthusiasm. Professor Siegan is currently a Distinguished Professor of Law at the University of San Diego. He is an excellent teacher, one who is extremely popular with both students and fellow colleagues.

As his Resume indicates, he is also a highly regarded constitutional law scholar. His list of publications is impressive and it includes the highly acclaimed recent book on Economic Liberties and the Constitution. Professor Siegan is understandably much in demand as a speaker on constitutional law issues throughout the country. He has a perspective on constitutional interpretation that is deserving of national attention. Despite his extremely busy schedule, Professor Siegan finds time for public service. He has, for example, recently served as a member of the President's Commission on Housing. Professor Siegan's professional achievements only reflect one of the reasons why he is an outstanding candidate for an appointment to the Ninth Circuit Court of Appeals. Along with being a true scholar of the law, he is also a warm, easily accessible person who is liked and respected by everyone. He is also extremely hard working and would be a superb colleague for the other members of the bench. Although I would feel great personal loss in having Professor Siegan leave our faculty, I would rejoice in his appointment. I personally have the greatest admiration for him.

Please let me know if I can provide any additional information as you continue the process of selecting appointees to the Court.

Sincerely,

Sheldon Krantz, Dean

SK:sc

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

5 June 1985

Dear Mr. Rees:

I am informed that Professor Bernard Segan is being considered for an appointment to the United States Court of Appeals for the Ninth Circuit. I would like to record my opinion that he would make an excellent judge. I have known him for many years during which he demonstrated his keen analytic abilities as a legal scholar and a maturity and wisdom that augur well for a capacity for judicial temperament. I confess that his views on the law are more conservative than my own, but I hardly think that to be a disqualifying factor.

I am available to respond to any questions that you may have about Professor Segan's qualifications.

Sincerely yours,

Philip B. Kurland

Hon. Grover Rees
Special Assistant to the
Attorney General
Room 5123
Department of Justice
10th Street and Constitution Avenue
Washington, D.C. 20530

PBK/s
cc: Hon. Robert H. Tuttle
Deputy Assistant to President for Personnel
The White House
Washington, D.C. 20511

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

JULIAN H. LEVI
Professor of Law

May 6, 1987

Senator Joseph R. Biden, Jr.
489 Russell Building
Washington, D.C. 20510

Dear Senator Biden:

I write to you in support to the nomination of Bernard Siegan to the Ninth Circuit Court of Appeals.

Prior to my coming to Hastings College of the Law, I served on the faculty of the University of Chicago as Professor of Urban Studies.

Bernard Siegan in 1969 was a Fellow in Law and Economics at the University of Chicago Law School. His work was in the field of zoning with which I had some familiarity in work I had undertaken on behalf of the University of Chicago in the Hype Park-Kenwood Community, and subsequently as chairman of the Chicago Plan Commission. Hence, I was requested to serve on the Siegan thesis committee, and I came to know Bernie very well.

I found him to be a person of great intellect and open-mindedness, and of high moral character. His thesis, subsequently published under the title of "Land Use Without Zoning," was a significant contribution to the literature in the field. I have followed his subsequent career in academia with interest. He is a first rate scholar of the Law. At the same time, he is not an ideologue. He is interested in differing points of view and has the intellectual honesty and courage to reexamine his positions.

In short, Bernard Siegan meets the standards for judicial appointment we all support. I hope the Senate, in its wisdom, confirms his appointment.

Sincerely,

Julian Levi

200 McALLISTER STREET • SAN FRANCISCO, CALIFORNIA 94102-4978 • (415) 565-4661

Institute for
Liberty and
Community

Concord, Vermont 05824
802-695-2555

March 10, 1987

Sen. Patrick Leahy
Senate Office Building
Washington DC 20510

Dear Patrick,

Your Judiciary Subcommittee will soon be reviewing the nomination of BERNARD SIEGAN to be an appeals judge, 9th Circuit. I realize that my support of a judicial nominee may produce precisely the opposite reaction in you, but hear me out on this one.

I first met Bernie Siegan in 1973, during the great debate in Vermont over state land use controls. He was then famous for having authored "Land Use Without Zoning", a careful and scholarly study of the effects of zoning in the nation's largest unzoned city, Houston. The study showed quite clearly that zoning was proposed in Houston as a way of protecting the well-to-do against the ravages of the lower classes. In the three zoning votes taken in Houston, the lower-income and minority wards voted strongly against it, while the upper income wards were strongly in favor. Later I visited Houston and saw the effects on no-zoning: vibrant mixed-use neighborhoods, where a poor guy could start a TV repair store or tortilla factory in his house, and where people could walk to jobs instead of riding buses or paying for cars to get from a residential neighborhood to a commercial zone many miles away. When President Carter appointed me to the National Commission on Neighborhoods, I adapted much of the findings of Prof. Siegan's study into the Report's section on "Legal, Fiscal and Administrative Obstacles to Neighborhood Self Reliance." The Report blasted zoning as a way of imposing costs on the aspiring people in low income neighborhoods.

In 1981 I had a hand in getting Prof. Siegan appointed to the President's Commission on Housing, mainly because he was a champion of striking down government barriers erected to thwart the economic aspirations and opportunities of the poor and minorities. On the Commission he performed with great ability, and was primarily responsible for the Commission report's emphasis on removing the barriers to increase supply, and thus lower the price, of housing.

Prof. Siegan's views on this subject are perhaps best summarized in an address he gave at a University of Chicago Law School conference in 1971:

"In maximizing production and competition probably lies the best hope we have for improved housing conditions. Thge existence of a highly competitive market is a tenant's best guarantee of lower rents and better maintenance and repair. Those of average or lower incomes are most harmed by government policies that impede the production and supply of housing. For a family struggling to maintain financial solvency, aa five or ten percent increase in rent can be a considerable hardship. These may well be the principal casualties of zoning."

On the basis of his long and sincere battle against governmental barriers to the advancement of the poor, if nothing else, I hope you will give Prof. Siegan your support for confirmation.

Yours truly,

John McClaughry
President

University of San Diego
School of Law

March 19, 1987

Steve Markham, Esq.
Assistant Attorney General
for the Office of Legal Affairs
Room 4234
Department of Justice
10th St. & Constitution Ave., N.W.
Washington, D.C. 20530

RE: Bernard Siegan's nomination to the U.S. Court of Appeals

Dear Mr. Markham:

Within the last month or so, I have read a number of disturbing newspaper articles regarding the views of Professor Bernard Siegan on the issue of desegregation. Several of these accounts contain gross inaccuracies regarding his position, and in fact, could appropriately be characterized as libelous. Although some of this unwarranted criticism has been allayed by articles appearing in the Los Angeles Times (on February 19, 1987) and in the Wall Street Journal (on March 3, 1987), nevertheless, I believe this is an appropriate time for me to write to express my support for Bernard Siegan's nomination.

I joined the University of San Diego School of Law Faculty in 1973. Professor Siegan joined the Faculty at that time as an Adjunct Professor, and has served as a distinguished professor here since 1975. In the 1977-78 academic year, I served as Acting Dean of the Law School and supervised some of Professor Siegan's activities. During that year, he arranged for a series of debates on economic policy and the law. He worked diligently to assure that the speakers who presented opposing views in those debates were of the highest quality so that all views of an issue would be aired.

In the 14 years I have known and worked with Professor Siegan, I have never heard him utter a racial or ethnic slur or act in anyway that would lead me to doubt his ability to decide cases in an unbiased manner. From my discussions with Professor Siegan, I am convinced that he fully supports the U.S.

Supreme Court's decision in Brown v. Board of Education. While Professor Siegan supports desegration in the schools, the work place, and elsewhere, he has legitimate concerns, as do many other Americans, about the propriety of forced bussing and quotas to achieve the desirable goal of integration.

I hope that the scurrilous attacks on Professor Siegan will cease and that he will be considered for judicial appointment on the merits. If this occurs, I am confident that Professor Siegan will be found to be a highly meritorious nomination.

Sincerely,

Grant H. Morris
Professor of Law

GHM:lg

University of San Diego
School of Law

April 6, 1987

Senator Joseph R. Biden
Russell Senate Office Bldg.
Washington, DC 20510

Dear Senator Biden:

I write in support of the nomination of Professor Bernard Siegan to the Court of Appeals for the Ninth Circuit and I urge his confirmation to this post.

Professor Siegan has been a colleague and friend ever since I came to San Diego in 1973. During the time we have worked together I have been able to observe him carefully as a lawyer, as a teacher, as a scholar and most importantly, as a human being. Through all these observations I have come to think I know him well and can therefore recommend his confirmation without qualification or hesitation.

As a lawyer Bernie is first rate. He is able to grasp legal concepts readily and knows how to turn them to effective use in advocacy. I find his approach to legal problems to be practical and thoughtful and not surprisingly, I understand he was most successful when he practiced law in Chicago.

As a teacher of Constitutional Law I know him to be adept at conveying complex ideas to students and he is also considered a fine teacher by those students privileged to have been in his class. It is noteworthy that while many people consider him to have strong ideologically based beliefs, which I think he does, as a teacher his presentation is free of any overtones that he is preaching some personal view rather than providing a balanced introduction to Constitutional Law.

As a scholar I believe his work a worthwhile contribution to the literature surrounding contemporary Constitutional analysis. I must confess to remaining unconvinced by some of his arguments concerning "original intention" but I have no doubts either about his sincerity or his basic view that an important, indeed the important, function of a court is to stand between a beleagured individual and the amassed power of the state. In all my discussions with him I have found him to be a stubborn advocate of his beliefs but always receptive to arguments in opposition to his positions.

Alcalá Park, San Diego, California 92110 619/260-4600

It is as a human being that I find Bernie most attractive. I know him to care for others, especially those experiencing misfortune. He is kind and compassionate and acts accordingly. Many years ago when a now deceased colleague began his long battle with a brain tumor, it was Bernie who unselfishly gave of his time and energy to be of help. When Bernie's beloved wife, Sharon, died of cancer I know how he suffered and how much he devoted himself to her care and comfort. I can honestly say that he is a wonderful person.

By way of autobiographical disclosure I am a member of the Faculty of University of San Diego School of Law and have been so for 14 years. I have served as Assoc. Dean. I am also a forty-four-year-old life long registered Democrat. I believe in the classical liberal view of our obligations to others and have tried to live my life accordingly. Quite honestly, I find nothing in my outlook that prevents me from giving my wholehearted support to Professor Siegan. I know he will be a fine judge of the Ninth Circuit.

On July 1, 1987, I will begin my appointment as Dean of the Dickinson School of Law in Carlisle, PA. Either before then, or later if you think useful, I would be pleased to provide further information, including testimony, in support of Bernie.

Thank you for considering my comments.

Sincerely,

Michael J. Navin
Professor of Law

MJN/rg

cc: Senator Strom Thurmond

Michael Pancer
ATTORNEY AT LAW
625 BROADWAY, SUITE 1135
SAN DIEGO, CALIFORNIA 92101-5418

(619) 236-1826

May 14, 1987

Senator Joseph Biden
(Delaware)
Senate Office Building
Washington, D.C.

Dear Sir:

It is the purpose of this letter to recommend for appointment to the Ninth Circuit Court of Appeals Professor BERNARD SIEGAN.

Professor Siegan is a well known and respected legal scholar in the San Diego area.

I have been practicing law in San Diego for approximately 15 years and have come to know Professor Siegan's legal skills through his writings, reputation and by personal discussion.

As a practicing attorney, it is clear to me that Professor Siegan possesses those qualities that would enable him to perform at the highest level as an Appellate Court Justice.

My specialty of law is in criminal defense and I have been active with the American Civil Liberties Union (a Past President of the Legal Panel and Past President of the Local Chapter). While I cannot speak for the American Civil Liberties Union, I mention my activities with them to demonstrate my concern in general for the principles of civil liberties. With this background, I have complete confidence that Professof Siegan will serve most fairly as a Justice. He is most concerned with the liberties of all citizens and has written extensively of this concern.

It is laudable that his concern for civil liberties is consistent. He recognizes and will protect, when just, the personal liberties and property rights of all citizens.

Professor Siegan also possesses an even temperament

and a willingness to debate without rancor. Such characteristics will make him an effective and welcome member of a deliberative body. He is committed to high ideals and he has shown that he can listen and be persuaded by fair argument. Certainly he possesses all of the qualities we would ask of a Justice.

Please contact me if I can answer any question or provide further information.

Yours truly,

Michael Pancer

MP:sd
cc: Senator Strom Thurman (N.Carolina)

bcc: Bernard Siegan

MARILYN R. RILEY
2120 I STREET
SACRAMENTO, CALIFORNIA 95816

JULY 8, 1987

SENATOR JOSEPH R. BIDEN, JR.
CHAIRMAN
SENATE COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

DEAR SENATOR BIDEN:

THIS LETTER IS IN SUPPORT OF THE CONFIRMATION OF BERNARD SIEGAN FOR JUDGE OF THE NINTH CIRCUIT COURT OF APPEALS.

I HAVE KNOWN PROFESSOR SIEGAN SINCE 1975, FIRST AS A STUDENT IN TWO OF HIS CLASSES AND THEN AS THE EDITOR FOR A NUMBER OF HIS ARTICLES AND TWO BOOKS, ECONOMIC LIBERTIES AND THE CONSTITUTION AND THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY.

AT NO TIME DURING THIS ACQUAINTANCE HAVE I EVER KNOWN HIM TO BE OTHER THAN HONORABLE AND DECENT IN HIS DEALINGS AND RELATIONSHIPS WITH OTHER PEOPLE. HE WAS THE MOST ACCESSIBLE AND CONSIDERATE OF TEACHERS. EVEN THOSE STUDENTS SUCH AS MYSELF WHO DISAGREED WITH MANY OF HIS OPINIONS FOUND HIM ALWAYS EAGER FOR DISCUSSION, OPEN TO DEBATE, AND RESPECTFUL OF OPPOSING IDEAS.

AS HIS EMPLOYEE, I NEVER FELT CONSTRAINED IN MY COMMENTS ABOUT BOTH THE FORM AND SUBSTANCE OF HIS WRITINGS. WE ARGUED FREELY, AND ON OCCASION I WAS ABLE TO INFLUENCE HIS VIEWS TO BE MORE REFLECTIVE OF MY OWN.

BECAUSE OF MY LONG AND CLOSE ASSOCIATION WITH PROFESSOR SIEGAN, I AM DISTRESSED BY THE ATTACKS ON HIS CHARACTER THAT ARE BEING LEVELED BY PEOPLE WITH WHOM I USUALLY AGREE ON POLITICAL AND SOCIAL ISSUES. I AM A LIFE-LONG DEMOCRAT AND ARDENT FEMINIST. (FOR THE PAST EIGHT YEARS I HAVE BEEN EMPLOYED AS STAFF TO SOME OF THE MOST LIBERAL MEMBERS OF THE CALIFORNIA LEGISLATURE AND AM CURRENTLY SENIOR CONSULTANT TO THE SENATE SELECT COMMITTEE ON FAMILY EQUITY, WHICH IS CHAIRED BY SENATOR DIANE WATSON FROM LOS ANGELES.)

I KNOW THAT WITH MY LIBERAL SENSIBILITIES I WOULD BE ABLE TO DETECT ANY ANTI-FEMINISM ON PROFESSOR SIEGAN'S PART, AND I CAN ASSURE YOU THAT IN MY PRESENCE, NEITHER PUBLICLY NOR PRIVATELY, HAS HE EVER GIVEN ANY INDICATION WHATSOEVER THAT HE PERCEIVES WOMEN AS OTHER THAN ABSOLUTELY EQUAL INTELLECTUALLY, PROFESSIONALLY, AND SOCIALLY TO MEN.

I FIRMLY BELIEVE THAT PROFESSOR SIEGAN WOULD MAKE AN EXCELLENT JUDGE--NON-IDEOLOGICAL AND FAIR TO A FAULT. I URGE HIS CONFIRMATION.

SINCERELY,

Marilyn R. Riley

MARILYN R. RILEY

MRR:TFW

CC: SENATOR STROM THURMOND

University of San Diego
School of Law

May 28, 1987

Senator Joseph R. Biden
Russell Senate Office Bldg.
Washington DC 20510

Dear Senator Biden:

The purpose of this letter is to express my support for the appointment of Professor Bernard Siegan to the Federal Court of Appeals for the Ninth Circuit.

Professor Siegan and I have been colleagues at the University of San Diego School of Law for approximately ten years. During a portion of that time, while I served as Associate Dean for Academic and Student Affairs, I would hear student, faculty and other persons' comments, opinions, and complaints. While I was Associate Dean and now as a member of the tenured faculty, I am pleased to report that I have heard only positive and laudatory comments about Professor Siegan's character and ability. He is regarded as an excellent teacher, a talented scholar, and a genuinely nice person who is open-minded and fair.

Although Professor Siegan and I do not always share similar legal or political views, I would never hesitate having him decide a case in which I was involved for I know he would be eminently fair and reasonable. His experience and temperament makes him a superb choice for the position.

Sincerely,

Virginia V. Shue
Professor of Law

VVS:ej

bc: B. Siegan

Siegel & Warnock
ATTORNEYS AT LAW
39 SOUTH LA SALLE STREET
CHICAGO, 60603
TELEPHONE 263-2000

JACK M. SIEGEL, P.C.
WILLIAM R. WARNOCK, P.C.

June 15, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Senator Biden:

I write to you to urge the confirmation of Bernard Siegan as a judge of the Ninth Circuit Court of Appeals. I am aware that confirmation hearings are scheduled for Mr. Siegan before the Judiciary Committee in the near future. I have known Mr. Siegan, both professionally and personally, for more than twenty-five years. He is a man of great intellectual capacity and unquestioned integrity. His temperament and intellect will make him an outstanding appellate judge.

My particular legal specialization is in the field of municipal and constitutional law. I am the corporation counsel for the City of Evanston and village attorney of Arlington Heights, Schaumburg and Riverwoods, all located in the Chicago metropolitan area. In representing municipalities, I have had frequent opportunity to deal with the areas of land use and constitutional law in which Mr. Siegan is a recognized specialist. I have had the privilege of arguing before the United States Supreme Court and appear frequently in the Seventh Circuit and the federal district court on municipal constitutional matters. I thus feel that I am in a position to judge Mr. Siegan's qualifications in these areas independently of my personal admiration for him.

I hope that the Committee will act expeditiously and favorably on Mr. Siegan's nomination. He will be an ornament to the federal bench and will serve with great diligence and honor.

Very truly yours,

Jack M. Siegel

JMS:rp

cc Senator Strom Thurmond

bcc Bernard Siegan

University of San Diego
School of Law

July 6, 1987

Senator Joseph R. Biden, Jr.
Chair, Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Professor Bernard H. Siegan

Dear Senator Biden:

I write you to support Profensor Siegan's nomination to the Ninth Circuit Court of Appeals. His confirmation is nov before your Committee and I urge its passage.

I have known and worked with Bernie Siegan for the past ten yenrs. I like him personally very much and highly respect his legnl knowledge, intelligence and integrity. I am probably as much a "liberal" as he is a "conservative" (as those terms have come to be defined) but his traits of honesty, compassion and fairness weigh more heavily with me and prompt this letter of support.

Sincerely,

Robert L. Simmons
Professor of Law

RLS/rg

Alcalá Park, San Diego, California 92110 619/260-4600

University of San Diego

School of Law

19 June 1987

Senator Joseph R. Biden, Jr.
Chair, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Senator Strom Thurmond
Minority Leader
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Gentlemen:

This letter is to strongly support the confirmation of Bernard H. Siegan as a judge on the United States Court of Appeals for the Ninth Circuit.

As one who is well acquainted with Bernard Siegan in a professional capacity, and as a Democrat, member of the American Civil Liberties Union, and active supporter of civil rights and an independent judiciary, I sincerely believe that Bernard Siegan will be an excellent federal appeals court judge for all people, regardless of race, sex, religion, political affiliation or economic status. Professor Siegan possesses in ample measure the key qualifications of competence, integrity and judicial temperament.

My acquaintance with Bernard Siegan began in 1973 when, as the then Dean of the University of San Diego School of Law, I employed Bernie as an adjunct professor, teaching a Land Use seminar. Bernie had recently moved to San Diego and had already established a reputation as an outstanding scholar in the fields of land use and law and economics. Nevertheless, he received only token compensation for his considerable devotion of time to the law school. As Bernie's involvement in the law school developed, he was made a full professor and I asked him to head a Law and Economics Center. In this capacity, Professor Siegan planned and implemented research, writing, and public lectures and debates involving law and economics. Bernie did most of the research and writing on his own and moderated each of the lectures and debates (with the exception of those in which he was one of the principal speakers). These programs were balanced presentations and were very well received by the academic and public communities of San Diego. They formed the basis of three books, subsequently edited by Bernie and published by Lexington Books.

Meanwhile, Bernie's interests broadened and his law school involvement became more extensive. He undertook the teaching of Law and Economics, and then of Constitutional Law, a required six-credit course at our law school. In connection with his work in constitutional law, Bernie also wrote and had published in 1981 a book on "Economic Liberties and the Constitution," and at present has another constitutional law text pending publication. His teaching and scholarship in the fields of law and economics and constitutional law continue to be widely acclaimed, both in San Diego and elsewhere. Because of his above average scholarly productivity and quality, and his success in securing educational grants for the law school, Siegan was designated as one of our Distinguished Professors. Although this title usually carries with it higher compensation, Bernie continued to receive a salary far below normal for a person of his quality, devoting essentially his full time to teaching and scholarship.

In sum, Professor Siegan is extremely knowledgeable in many fields of learning relevant to the task of a federal appellate judge, and has enjoyed an excellent reputation. As is the case with many academics who have sat on the Court of Appeals with distinction, Professor Siegan does not have extensive recent trial court experience; nevertheless, I am aware that he was a successful legal practitioner in Chicago, Illinois, prior to relocating in California in 1972.

In addition to possessing the competence, skill, and learning necessary to the execution of the duties of a federal appellate court judge, Bernie is a man of utmost integrity who enjoys an excellent reputation for morality and civility. He always behaves as a gentleman, treats everyone with respect, whether or not he agrees with their views, and is conscientious in his devotion to both teaching and scholarship. While I have occasionally disagreed with the legal conclusions and policies which Bernie has articulated, he has always respected my views, given me a fair hearing, and amply supported his own views. Each dialogue with Bernie Siegan has been a learning experience for me and others who have been fortunate enough to be involved with his professional activities.

Recently I was engaged in an effort, along with San Diegans and Californians for an Independent Judiciary, to seek retention of all the incumbent members of the California Supreme Court. While this effort was not successful, I remain committed to the goals of judging judges by their competence

and integrity and not by their politics or views on particular legal issues. In my opinion, Siegan's competence and integrity cannot be reasonably questioned, nor is there any question that he would apply the law with impartiality and equality, and with a high level of judicial temperament. In the fifteen years during which I have known and worked with Professor Siegan, I have never heard him make any statement that would indicate that he did not believe in full recognition and protection of the civil rights of all individuals. Nor has any student in his classes reported anything to me during my deanship, which ended in June of 1981, or since, which would indicate that Professor Siegan is insensitive to racial or other minorities. His teaching of Constitutional Law, for example, has been regarded as objective and of high calibre.

Both our faculty and students have always found Bernie Siegan to be respectful of differing views and vigilant in recognizing the rights of all human beings to an equal opportunity to a quality education, and to freedom of expression and legal action. His own life, at least since I have known him, has been dedicated to thorough and principled research, scholarship, and teaching.

While Professor Siegan prefers to avoid labels, such as liberal or conservative, I find his views to be most compatible with those of a libertarian philosophy, along the lines of great lawyers such as Arthur Garfield Hayes (who legally challenged government interference with both individual and property rights, was a prominent member of the American Civil Liberties Union, pioneered its dedication to the Bill of Rights, and also opposed government regulation which he believed interfered with the freedoms of individuals and business entities). In other words, Bernard Siegan's views strongly endorse Constitutional principles protecting individual civil rights, private property rights, equal protection of the laws, and substantive and procedural due process of law.

Knowing Professor Siegan's philosophical and intellectual views, and his character and humane demeanor, it is inconceivable to me that he would harbor any attitudes incompatible with the recognition of the full and equal legal rights of all racial, religious, ethnic, or other minorities.

While Professor Siegan and I may have different opinions on some Constitutional issues or with the wisdom of existing or proposed Congressional legislation, I have no doubt that, as a judge of the United States Court of

Appeals, he would faithfully follow the law as interpreted by the United States Supreme Court, and administer the law to all parties equally and fairly without regard to their gender, racial, ethnic, or other legally irrelevant status. In short, Bernard Siegan would fully comply with all aspects of the Code of Judicial Conduct, including performing his judicial duties impartially and diligently (Canon 3), upholding the integrity and independence of the judiciary (Canon 1), and avoiding impropriety and the appearance of impropriety in all of his activities (Canon 2).

In addition, Bernie Siegan has contributed his ample talents to a number of public causes, including service on the Bicentennial Commission on the Constitution and on the President's Housing Task Force, pro bono advice to city officials and public interest groups, and selfless involvement in the activities of the University of San Diego.

In conclusion, it is my belief that Distinguished Professor Bernard H. Siegan has all of those qualities, such as extensive knowledge, highly developed writing and oral skills, integrity, and judicial temperament, which would make him an excellent member of the federal appellate judiciary.

I therefore urge that you recommend confirmation of Professor Siegan's nomination to the Ninth Circuit Court of Appeals. If you have any questions or would like further information, please let me know.

Respectfully yours,

dtw/rms

Donald T. Weckstein
Professor of Law

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

WILLIAM K.S. WANG
Professor of Law

July 10, 1987

The Honorable Joseph R. Biden, Jr.
Chairman,
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

I am delighted to support Professor Bernard Siegan's confirmation as a judge of the Ninth Circuit. He is eminently qualified for the position.

I first met Professor Siegan in 1974, when he joined the faculty of the University of San Diego Law School. I was a law professor there from 1972 to 1981. During that period, I developed a great affection and respect for Professor Siegan. He became one of my closest friends on the faculty. In fact, he so impressed me that I audited one of his classes for most of one semester. I found him to be an insightful and scintillating teacher, who was justifiably popular with the students.

Indeed, Professor Siegan is liked and admired by virtually everyone he meets. He is both brilliant and self-deprecating, a rare combination. He is also blessed with a wry, soft-spoken, but appealing sense of humor.

His good nature, kindness, and generosity are especially endearing. I have never seen him lose his temper. He is always courteous and considerate. From my perspective as a Chinese-American, Professor Siegan has always seemed sensitive to the feelings of minority groups.

You have undoubtedly received many letters about Professor Siegan's truly outstanding intellect and scholarship. I can only echo this praise. Professor Siegan and I have had countless debates and discussions on all sorts of issues, and I have always found him brilliant and delightfully thought-provoking.

200 McALLISTER STREET • SAN FRANCISCO, CALIFORNIA 94102-4978 • (415) 565-4666

The Honorable Joseph R. Biden, Jr.
Chairman,
Committee on the Judiciary
United States Senate
July 10, 1987

For one semester, I worked as a full-time consultant to the White House Domestic Policy Staff during the administration of President Carter. I have often disagreed with Professor Siegan, but have always found him open-minded and flexible. He is definitely not an ideologue.

I have absolutely no reservations about Professor Siegan's fairness, objectivity, personal integrity, and dedication to legal scholarship and the legal profession. He is one of the most reliable and responsible individuals I have ever met.

In short, I cannot recommend Professor Siegan more highly for an appointment to the Ninth Circuit.

Respectfully,

William K.S. Wang

William Kai-Sheng Wang
Professor of Law

cc. The Honorable Strom Thurmond
United States Senate

Professor Bernard Siegan
University of San Diego Law School

University of San Diego

School of Law

June 25, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Senator Biden:

I write to you to urge the confirmation of Bernard Siegan as a judge of the Ninth Circuit Court of Appeals.

I have known Professor Siegan both professionally and personally since 1980 when I joined the faculty of the University of San Diego School of Law as Director of the Environmental Law Clinic and as a Clinical Professor of Law.

My particular legal specialization is in the field of Environmental Law and I have recently been awarded a major environmental organization's public award for outstanding achievement in environmental protection. I mention this only to demonstrate my own personal commitment to and reputation in this area.

Professor Siegan's views are different from my own both in politics, generally, and in environmental protection, particularly. Nevertheless, I endorse his nomination and recommend him to you without reservation.

He is a man of great intellectual capacity, unquestioned integrity and a kind and thoughtful person. I can think of no better qualification for this position than these.

He will be a fine addition to the federal bench and I am confident he will produce thoughtful, and fair appellate opinions following the law in each case in an impartial manner.

Very truly yours,

Richard J. Wharton

Richard J. Wharton
Director
Environmental Law Clinic

RJW/rg

Alcalá Park, San Diego, California 92110 619/260-4600

University of San Diego

School of Law

November 13, 1987

The Honorable Strom Thurmond
United States Senate
218 Senate Russell Office Building
Washington, DC 20510

Dear Senator Thurmond:

Enclosed are answers to the questions you have submitted to me. Thank you for this opportunity to set forth my views.

Sincerely,

Bernard H. Siegan
Distinguished Professor
of Law

BHS/rg
Enclosure

Alcalá Park, San Diego, California 92110 619/260-4600

SENATOR THURMOND'S QUESTIONS FOR PROFESSOR BERNARD H. SIEGAN, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

1. PROFESSOR SIEGAN, PRIOR TO YOUR NOMINATION THERE WERE REPORTS THAT IN A DRAFT ARTICLE YOU HAD PREPARED FOR THE CATO INSTITUTE YOU CRITICIZED BROWN V. BOARD OF EDUCATION AND OTHER DESEGREGATION CASES. IS THIS CRITICISM ACCURATE, AND IF NOT, WHAT DID THE ARTICLE ACTUALLY STATE?

Answer: Shortly after my nomination was announced, a single journalist incorrectly reported that an original draft of my essay in a 1984 Cato Institute publication was critical of Brown v. Board of Education. In fact, neither the draft nor the published article mentioned the Brown decision. Several weeks later, after examining the relative portion of the draft and correspondence between the Cato editor and myself, the paper admitted its story had been incorrect.

The 20-page Cato article, "The Supreme Court, the Final Arbitrar", addresses the purpose of judicial review and the role of the Supreme Court in our constitutional system of government. In several paragraphs I criticized as violative of the separation of powers doctrine judicial decisions and practices that went beyond requiring desegregation and instead imposed judicial administration in cases where no constitutional violation had been established.

2. PROFESSOR SIEGAN, YOU HAVE WRITTEN AND SPOKEN ABOUT LOCAL HOUSING REGULATIONS THAT LIMIT THE PRODUCTION AND DISTRIBUTION OF HOUSING. IN PARTICULAR, YOU REPORTEDLY HAVE CRITICIZED ZONING

LAWS THAT EXCLUDED LESS AFFLUENT PEOPLE FROM CERTAIN AREAS AND AS A RESULT INCREASED THE PRICE OF HOUSING. IS THIS CHARACTERIZATION CORRECT AND WOULD YOU ELABORATE ON YOUR THEORY CONCERNING THIS MATTER?

Answer: I have criticized exclusionary zoning; that is, zoning regulations imposed to exclude less affluent people from entering a community. Such regulations limit the production of housing and increase its cost. These regulations do not advance health and safety and are harmful to poorer people and minorities. They exclude many people from living in areas of their choice.

3. PROFESSOR SIEGAN, IN REVIEWING YOUR QUESTIONNAIRE, I NOTED THAT YOU HAVE BEEN DIRECTING THE DEPARTMENT OF JUSTICE IN THE PREPARATION OF A BIBLIOGRAPHY ON THE ORIGINAL MEANING OF THE PROVISIONS OF THE U.S. CONSTITUTION. WOULD YOU PLEASE TELL THE COMMITTEE WHAT THIS WORK ENTAILS AND THE OBJECTIVE OF SUCH A BIBLIOGRAPHY?

Answer: Since June 1986, I have been directing a project the University of San Diego Law School is conducting for the Justice Department to prepare a bibliography of original constitutional meanings. The bibliography lists references to the intentions of the framers of the Constitution and subsequent amendments as found in: (1) the debates of the framing bodies; (2) the debates of the ratifying bodies and related commentaries; (3) the scholarly works of the early commentators; (4) the United States Supreme Court cases; and (5) the scholarly works of modern commentators. Listings comprehend or refer to statements and comments made by members of the framing bodies, members of state ratifying conventions, U.S. Supreme Court justices and leading

legal commentators.

The work was largely researched and compiled by students at the law school supervised by two members of the faculty. Secretarial services were provided by the Law School. In concert with attorneys at the Justice Department, I determined the general area of inquiry and consulted with those working on the project. I also have conducted some research and added a small number of listings. I will not receive any compensation for these services.

4. PROFESSOR SIEGAN, WHAT IS THE PROPER APPLICATION OF STARE DECISIS IN CONSTITUTIONAL LAW? SPECIFICALLY, WHAT IS THE DUTY OF A FEDERAL JUDGE WHEN CONFRONTED WITH A CASE IN WHICH ONE OF THE PRECEDENTS OF HIS COURT CLEARLY CONFLICTS WITH THE CONSTITUTION AS THAT JUDGE INTERPRETS IT?

Answer: A federal circuit or district judge is obligated by the oath of office to apply existing precedent in deciding cases. The judge's personal views on whether the precedent is a correct constitutional interpretation or not are irrelevant. The duty of an appeals and trial court is to apply existing law as enunciated by the Supreme Court and not to create it.

Senator DECONCINI. I do not want to keep the Senator from New Hampshire. I would be glad to yield to him if he would like to ask some questions. I do have some other questions.

Senator HUMPHREY. Thank you, Mr. Chairman, and welcome at long, long last, Professor.

Mr. SIEGAN. Thank you.

Senator HUMPHREY. I was beginning to wonder if there really was in the flesh a Professor Siegan, apart from the name that has languished here for 9 months. I want to thank today's Chairman for volunteering, really, coming forward and offering to make himself available today so that, at long last, we might have you before the committee.

I regret very much that you have been kept waiting 9 months. I think that delay was unconscionable, indecent, and unfair, and to the extent that one member can apologize for the committee, I apologize to you, Professor, for the shabby treatment you have received at the hands of this committee.

Mr. Chairman, am I correctly informed that there will be a subsequent hearing for Professor Siegan?

Senator DECONCINI. Well, let me advise the Senator from New Hampshire, I certainly have not come to that conclusion one way or the other. I intend to ask the professor a number of questions. The only thing that is going to run out on me is the clock.

I may become satisfied after I am finished here. I cannot speak for other members of the committee, but I hope to satisfy myself with the questions that I intend to ask.

Senator HUMPHREY. I see.

Senator DECONCINI. So I am sorry. I do not know.

Senator HUMPHREY. It is not a foregone conclusion that——

Senator DECONCINI. Not as far as this Senator is concerned

Senator HUMPHREY. Good.

Senator DECONCINI. You know, maybe the chairman of the committee has decided that. I do not know.

Senator HUMPHREY. I will reserve for now any questions that I might want to put, Mr. Chairman. Thank you very much.

Senator DECONCINI. Thank you, Senator Humphrey.

Professor Siegan, your questionnaire also mentioned that you appeared before administrative and legislative bodies in about 80 public hearings, mostly on zoning matters. Were any of these of particular significance that you can remember the cases or did any of them result in being appealed to higher courts?

Mr. SIEGAN. Let me answer the first part. The cases covered a broad spectrum. Some of the situations were simply obtaining a variation in a lot line. On the other side were extensive hearings and extensive proceedings before a municipality, the purpose being to erect—for builders to erect a significant subdivision.

I think that all the instances where there was an appeal to courts in any of the 80 situations is listed in my questionnaire, so there were times when there was an appeal to a court or court process was necessary at a certain point.

Senator DECONCINI. Do you have any recollection as to the relevance of some of these or any of these appearances as to serving on the circuit court of appeals?

Mr. SIEGAN. Well, I might say this. I had an extensive background in zoning law, in real estate law, and it looks here as if I did not have many cases, and I did not. And that might be looked at, well, as if there were a paucity of experience.

The other side is that during my experience as a lawyer, I worked very hard to avoid court process. And if you think about 20 years during which I was involved in very controversial areas with a lot of people having different positions, I frequently managed to maintain things out of court.

Senator DECONCINI. Is it fair to say that in the course of that 20 years of practice and not going to court, you had many negotiations and many documents that you drew for people?

Mr. SIEGAN. That is correct, yes.

Senator DECONCINI. And give us a little background of what kind of documents, trusts or contracts or deeds, or just what kind of documents would you recall that you drew?

Mr. SIEGAN. Well, let us take a situation where the developer wants to build a development of 4 or 500 homes in a particular municipality. The developer starts off by seeking to obtain ownership to the property or an option to the property. I was involved in those documents.

Senator DECONCINI. In drawing the contracts, drawing the option agreements and seeing that they were fulfilled once they were——

Mr. SIEGAN. That is correct. I was involved in the entire process until the homes were actually built, and that is a lengthy process.

Senator DECONCINI. Including closing the real estate transactions, reviewing all the documents?

Mr. SIEGAN. Not the individual homes. Occasionally——

Senator DECONCINI. No, but on a parcel of land?

Mr. SIEGAN. Yes, for the land. A contract for the land would——

Senator DECONCINI. And would that require reviewing the title, searching the title?

Mr. SIEGAN. Yes; well, yes.

Senator DECONCINI. Abstracts, or whatever was used in Illinois?

Mr. SIEGAN. Yes, and it also required obtaining an annexation agreement with the municipality. In most cases, the property was not within a specific municipality. It was in a county, in an unincorporated area.

The next step would be to obtain an annexation agreement with the municipality. As part of that annexation agreement, it would be necessary to obtain a certain zoning that would allow construction of the development. If the developer wanted to build single-family, that kind of zoning would be required. If he wanted to build apartments, that kind of zoning would be required.

We would then obtain an annexation understanding, if we could, with the municipality where the principal aspect of that was being annexed to the municipality and having the property zoned in a manner that would allow the developer to develop that property.

I was involved in all those negotiations, the public hearings that were involved, the agreements, sometimes covenants that had to be filed. It was the entire range of obtaining raw land and making that raw land available for development.

It sometimes may take a year, it may take 2 years. I do not recall if it took more than that.

Senator DECONCINI. How many lawyers were in your law firm?
Mr. SIEGAN. My partner and I were——
Senator DECONCINI. The two of you?
Mr. SIEGAN. That was the law firm.
Senator DECONCINI. You were not a litigation firm, per se?
Mr. SIEGAN. No.
Senator DECONCINI. You were more a commercial real estate, business-oriented firm?
Mr. SIEGAN. No. We were a law firm. The law firm was Siegan and Karlin. We also had organized corporations, and I list the corporations here. When we owned property, it was either in our own names or through the various corporations.
In one instance, we built—through one of these entities, we built apartments. The individual corporations bought and sold land or developed the land. We acted in our capacity as attorneys in behalf of those particular entities, but we also represented other entities. For 7 years, we were lawyers for a major developer in the northwest suburbs, Zale Construction Company.
Senator DECONCINI. And some of the clients you represented—would you or your partner have done the litigation, if there was litigation, or did you sometimes find someone else to do that?
Mr. SIEGAN. Both. In some cases we did the litigation; at other times we transferred it to others for that purpose.
Senator DECONCINI. And would you consider yourself a speciality firm?
Mr. SIEGAN. Pretty much. We handled a lot of things lawyers always handle.
We handled two divorces, I was mentioning to Senator Wilson.
Senator DECONCINI. In 20 years, you handled two divorces?
Mr. SIEGAN. Two divorces, so we were not specialists in that area.
Senator DECONCINI. So you were not obviously a domestic——
Mr. SIEGAN. But we handled a great deal of property work of the kind that I have just mentioned to you.
Senator DECONCINI. What about estate planning? Did you do estate planning?
Mr. SIEGAN. Nothing.
Senator DECONCINI. Did you do personal injury?
Mr. SIEGAN. Perhaps three or four cases. I do not recall.
Senator DECONCINI. And you did corporate work, incorporating and managing the legal part of corporations?
Mr. SIEGAN. Yes, of our own, as well as others.
Senator DECONCINI. But you filed articles of incorporation and did that sort of work?
Mr. SIEGAN. Yes.
Senator DECONCINI. Did you have any background in the legislative area? Did you do any lobbying for clients or——
Mr. SIEGAN. None, none, just talking to zoning boards, people on zoning boards on occasion, to legislators about matters of interest to ourselves or our clients.
Senator DECONCINI. In the course of your professional career, Mr. Siegan, did you do any arbitration, participate in any arbitration?
Mr. SIEGAN. No, not on a formal basis; let me put it that way.

Senator DECONCINI. Do you mean by that that any arbitration was done between you and the other client's lawyer in settling a case, but you did not arbitrate yourself or appear before any arbitrators in settlement of disputes?

Mr. SIEGAN. No, but I guess what I am referring to is when you have so few cases in an area that is as controversial and as active, it does at times require "arbitration."

Senator DECONCINI. In one of your books, Mr. Siegan, called "The Supreme Court's Constitution"—and if you would like to refer to that, if you have it there, it is on page 9 of the introduction—you state about the Supreme Court's decision, quote, "Although majority opinions usually assert that the Justices are doing no more than which the fundamental law requires, a closer analysis casts doubt on this contention."

You go on to say, quote, "the Court has frequently ruled either contrary to or without guidance from constitutional meanings and purposes." These statements somewhat concern me, if that is your view of the Supreme Court and its past decisions.

I have many differences with the Supreme Court on their decisions, but I have always respected their constitutional, intellectual arguments even though I may violently disagree with them so much that it would move me to introduce legislation to overrule those decisions or to pass a constitutional amendment, if it was constitutional.

Can you give us a little understanding of what you mean by that and how you see the Supreme Court positions on constitutional law?

Mr. SIEGAN. Mr. Chairman, I am a critic as a scholar, and it turns that when one is a critic one is imbued with the writing one does. This does not tell the amount of respect I also have for the Supreme Court.

I do not want to say it is a wayward organization that is just out in the blue doing what it wants to do, and just to start off on perhaps a different foot, I want to say that I think the Supreme Court on the whole has been a marvelous institution. I think the country is much better off for it.

I have enjoyed the liberties which it has provided me. I have enjoyed free speech in my activities. I am a teacher, I am a speaker, I am a writer. I am Jewish; I am protected in my faith.

I do not want to minimize the Supreme Court's greatness and its contribution to our society. I think our society is probably the freest in the world largely due to Supreme Court rulings.

However, I think it has not always done what it should have done, and that is what I refer to here. I do not know if you read it as saying everything that it has done is no good, because if I said that, I certainly did not mean that.

Senator DECONCINI. I did not say that you said that. I said that you said, quote, "Court has frequently ruled either contrary to or without guidance from constitutional meaning and purpose." Can you explain that statement?

Mr. SIEGAN. I think that is so. It is the kind of a statement that appears very frequently in dissenting opinions. You know, it is not unusual when the dissenters say, well, you have gone way beyond your authority as a court.

I specify the kind of things the Court has done that, to my way of thinking, enable me to make that statement, and that is what the book is about.

Senator DECONCINI. Well, do you believe it is the duty of a court of appeals judge to follow precedents of the Supreme Court?

Mr. SIEGAN. Without question. There is no question in my mind, and I believe in the Constitution. It is essential than an appeals court judge follow completely what the law of the land is, as interpreted by the Supreme Court.

In my view, a circuit court judge has no discretion whatever to depart——

Senator DECONCINI. There is no situation where it is appropriate for a court of appeals judge to ignore or overrule the Supreme Court?

Mr. SIEGAN. I cannot think of any, Senator.

Senator DECONCINI. According to an article of yours published by the Cato Institute in 1985—this was at page 279—you said that Section 1 of the 14th amendment, quote, "safeguards only fundamental and natural rights from violation by the States. There is no fundamental or natural right to education, nor to an integrated education. Each is a political right created by government and is accordingly not within the guarantees of the 14th amendment."

Can you explain that, or is that really self-explanatory? That is a very violent statement, I find, from the standpoint of equal protection and safeguards under the 14th amendment.

Mr. SIEGAN. I am speaking in that sentence as an historian. That is as I see history, but let me be more specific. In two cases—the *Rodriguez* case, the opinion by Justice Powell, in the *Plyler* case opinion by Justice Brennan—education was held not to be a fundamental right, and that wording is specifically in the case. It is not my wording; it is specifically in the case.

So what I have said there, while it may sound shocking, comes largely from the words of that case, and that is the law today.

Senator DECONCINI. What are these natural rights that are protected by the 14th amendment?

Mr. SIEGAN. Natural rights would include speech and press and religion and property and, I believe, privacy. A host of rights would be protected. At no time, I want to emphasize, has the Supreme Court said that fundamental rights include education.

Senator DECONCINI. How about the right of privacy?

Mr. SIEGAN. Yes. The Court has said that. As far as I am concerned, as a circuit court judge, that is what counts, but I personally feel the same way. I certainly——

Senator DECONCINI. Do you believe that there is a right of privacy in the Constitution?

Mr. SIEGAN. Yes.

Senator DECONCINI. That would be termed a natural right?

Mr. SIEGAN. I would so term it.

Senator DECONCINI. What about the Equal Protection Clause of the 14th amendment as it applies other than in racial cases? Do you feel that it does apply?

Mr. SIEGAN. Yes. I think the 14th amendment was, in my view, intended to be a broad protection for individual liberty.

Senator DECONCINI. So gender discrimination, alien discrimination, or something along that line would be, in your term, considered a natural right because it is within that amendment?

Mr. SIEGAN. I would say it is protected.

Senator DECONCINI. It is protected within that amendment?

Mr. SIEGAN. It is protected. Any natural rights in those areas would be protected under the 14th amendment.

Senator DECONCINI. And give me an example or two of political rights, education being one, as you——

Mr. SIEGAN. Education, jobs at the State level, office-holding at the State level, taxation, spending. I might add voting. Now, I do not know that——

Senator DECONCINI. Voting would be political, or would that be a fundamental or natural right?

Mr. SIEGAN. Well, let me say as far as the Supreme Court is concerned, voting is a right which is fully protected as much as any fundamental right. However, if you look at the history of the 14th amendment and go back to the debates of the Congress of 1866, continually those gentlemen referred to voting as a political right.

In fact, if they had referred to it any other way, the 14th amendment may never have been ratified. But as far as the subsequent actions of the Court, the Court certainly in the *Harper* case held that voting was a fundamental right, and I fully accept that.

Senator DECONCINI. Fundamental right, and you have no argument with that?

Mr. SIEGAN. I fully accept that.

Senator DECONCINI. And that, of course, means that it cannot be restricted by the Federal Government or the State government. It can be regulated, but it cannot be prohibited or restricted.

What is your position, Mr. Siegan, on the Bill of Rights as it applies to States? Is it incorporated through the 14th amendment?

Mr. SIEGAN. I believe so. I believe the entire Bill of Rights was incorporated in the 14th amendment.

Senator DECONCINI. In your publication "The Supreme Court's Constitution," you write at page 120, quote:

> The U.S. Supreme Court has never authored a majority opinion that provides a reasoned explanation for why the 14th amendment Due Process Clause incorporates the Establishment provisions.

What do you mean by that?

Mr. SIEGAN. The thought that is involved here is the Establishment Clause appears in the first amendment. Is it incorporated in the Due Process Clause of the 14th amendment? That is a question that is very important.

I think I have read almost all the establishment cases, if not all of them. The Court has held that the Establishment Clause is incorporated in the Due Process Clause of the 14th amendment. It is my view that that very important ruling has never been very adequately explained.

Senator DECONCINI. Do you have any evidence that any Justice in the last 40 years has held the view that the incorporating doctrine is incorrect?

Mr. SIEGAN. The incorporating of the 14th amendment?

Senator DECONCINI. Right.

Mr. SIEGAN. Of the Establishment Clause?

Senator DECONCINI. Of the Establishment Clause.

Mr. SIEGAN. No, none. This is really—I am really commenting now as a scholar. In my view—this is my opinion. You may disagree. You may say that the five sentences that appear are very persuasive and they persuade me that the incorporation occurred.

It is my view that there should have been a great deal more thought given to that, and that the opinions should have been more persuasive. That is a personal opinion. I do not say that as anything more than a scholar who reads a lot of cases and finds that in this area I would have felt much better if I had a more reasoned explanation from the U.S. Supreme Court, and that is all I have said here.

Senator DECONCINI. Chief Justice Rehnquist acknowledged at his confirmation hearings that he accepts the incorporation doctrine, even though he had taken some positions in several cases that might indicate otherwise.

And you certainly accept that?

Mr. SIEGAN. I accept that all rights in the Bill of Rights are incorporated in the 14th amendment. I find it difficult to find the Establishment Clause within that incorporation.

Senator DECONCINI. But you acknowledge that the Court has done that?

Mr. SIEGAN. Yes, the courts have done it. As far as I am concerned, there is not the slightest issue on that. I cannot conceive of anybody today as a circuit court, as a Supreme Court judge, as any judge, saying that the Establishment Clause is not incorporated in the Bill of Rights.

Senator DECONCINI. And that would apply to yourself?

Mr. SIEGAN. Yes. I am sorry. I meant to say in the Due Process Clause. I certainly accept that. As a judge, I would not dream of quarreling. I would be laughed off the block if I were to say otherwise, and I do not mean not only not to be laughed at. I want to carry out my duty fully with my obligation, and what I may think on the subject is really irrelevant in making decisions in the ninth circuit.

Senator DECONCINI. In "The Supreme Court's Constitution," your book, on page 118 you say, quote,

> By placing a limitation on the authority of the central government to advance a national religion, the Establishment Clause as originally drafted safeguarded the powers of the States to sponsor or further religions in their own choosing.

Can you explain what you mean by that statement? Maybe it is taken out of context.

Mr. SIEGAN. No. I think that is correct, but there is more to it than what is set forth there. One reason for the Establishment Clause was to tell the States that you need not worry about the Federal Government setting up its own national religion or promoting its own national religion.

I do not think that there is much controversy with that.

Senator DECONCINI. I do not either. This does not mean that you believe the States could or would be free to sponsor a religion?

Mr. SIEGAN. Well, I would say the States are not free to sponsor a religion because of the Free Exercise Clause. In other words, I

cannot see States sponsoring a religion, with all that that involves in promoting a religion, in harming people who are not part of that religion. The Free Exercise Clause covers that, in my view, completely.

Senator DECONCINI. Completely, including any prohibition or outlawing by a State of any religion?

Mr. SIEGAN. Yes, certainly.

Senator DECONCINI. What is your view of the 14th amendment as to how it operates to protect the practitioners of a minority religion or one that is very distinct or may be considered controversial?

Mr. SIEGAN. I fully agree with the Supreme Court decision that came down not long ago to that effect.

Senator DECONCINI. And you would have no trouble holding that or legally accepting that case?

Mr. SIEGAN. None.

Senator DECONCINI. Senator Wilson, when he introduced you, made reference to one of your colleagues, I believe, at Harvard indicating that you were a libertarian. I do not want to take that out of context.

How do you classify yourself?

Mr. SIEGAN. I try, Senator, not to classify myself, but certainly I am referred to quite often as a libertarian.

Senator DECONCINI. What does that mean to you, Professor Siegan?

Mr. SIEGAN. I think it is—the definition is determined very much by who gives it. The basic idea is to limit government whenever possible. As I see it, it would be absurd to limit government all the time; then we would have anarchy.

But somewhere along the line, libertarians want to limit government, that is, want to limit government to where government is essential. That is a rough definition. Libertarians may forever condemn me for it, but I think that is the way I see that particular thinking.

Senator DECONCINI. And how do you take that particular thinking to the court of appeals if you are confirmed?

Mr. SIEGAN. I do not, Senator. My thinking is totally irrelevant.

Senator DECONCINI. When you say it is totally irrelevant, I understand. I think what you are trying to say is that that is not going to be your guiding light. Of course, your thinking is not irrelevant. What you are and what you have written and how you think is very important and, quite frankly, is very relevant.

And I do not disagree with some libertarian premises that the government should stay out of things that they clearly have no business in, but yet that is somewhat of a subjective decision that we all have to make. Where should the government properly be in and where should it not?

How much of that is going to be influenced by your acknowledgment of being at least designated as a libertarian, without you admitting that that is what you are? And I do not care what you are, but I am trying to figure out how you are going to take Bernie Siegan's years of distinguished professorship and being a practicing lawyer in the State of Illinois—how you are going to take that to the circuit court.

Mr. SIEGAN. Well, I am going to look at the fact situation before me and look up the cases and try to decide how the Supreme Court would hold in a particular case. Whether I like that or do not like it is really irrelevant.

The purpose here as an appeals court judge is to carry out the will of the Supreme Court and certainly not Bernie Siegan's will.

Senator DECONCINI. In another book of yours, "Economic Liberties and the Constitution," you argue that the Constitution protects the property and contract rights of employees. At page 122 through 125, you cite favorable 1908 and 1915 cases in which the Supreme Court concluded that the Constitution prevented a State from depriving employees of their superior bargaining power because such a deprivation infringes on the employees' property rights.

What is your opinion of the power of the Congress to regulate the relationship between employers and employees?

Mr. SIEGAN. Well, Senator, this is ancient history. The cases involved in these pages have been overruled by the U.S. Supreme Court. They are meaningless insofar as current litigation is concerned.

Senator DECONCINI. Is it your opinion that Congress can regulate that relationship?

Mr. SIEGAN. Under current law, without any question.

Senator DECONCINI. And the States, also?

Mr. SIEGAN. Without any question.

Senator DECONCINI. In your book, going back to "The Supreme Court's Constitution," you said, quote:

> A definitional equality in gender is being protected at a price, possibly a very significant one, making this outcome even harder to justify in the dubious authority of the Court in the matter. As has frequently occurred in other areas, the Court's projected moral position is compromised by the harm it imposes on those who trace their rights to original understandings.

In this statement, who are you referring to as those who trace their rights to original understandings?

Mr. SIEGAN. People who oppose what the Supreme Court has done. What I am saying there is a conflict here. On one side, a certain view is projected. On the other side, people say I have a right to what I am getting. This is in the area of gender where men obtain certain benefits, women obtain certain benefits.

The Court at times limited those benefits and the cry was—and I do not mean to minimize that cry or overdo it—the cry was you, Court, are doing the wrong thing; under the Constitution, I am entitled to these benefits. You, as a Court, cannot limit those benefits or take those away from me, and that is not an unusual dispute in constitutional controversy.

Senator DECONCINI. What is the possible significant price that equality in gender has cost?

Mr. SIEGAN. I have no price. I think that the Court should always consider when it makes a ruling all the consequences in so ruling, and the consequences of that ruling, if there are enormous sums involved, should not be ignored. I do not want to put a price——

Senator DECONCINI. If you had a hypothetical discrimination case based on monetary return and it was a gender case, and if you rule in favor of the plaintiff or the complainant who was a woman

claiming that she was entitled to be paid the same as the male on the job was, in determining her constitutional rights to that pay you would look at the economic significance of that in making that judgment. Is that what you are saying?

Mr. SIEGAN. No. We are talking about a different situation. I do not like——

Senator DECONCINI. I am asking you now if you disagree.

Mr. SIEGAN. No. I would say ordinarily not. I do not want to sell my freedom of speech for whatever sum it is. I do not want rights to be extinguished on the basis of dollars and cents.

What we are talking about in this situation is a Federal program that has been geared to a certain amount of spending. If the court changes the beneficiaries of that Federal program, spending can go much higher than was anticipated.

Senator DECONCINI. Or you could argue also that if you broaden the class that is included and do not add any more money, then the class that is previously included is going to have less because you have broadened it, is that right?

Mr. SIEGAN. I agree, I agree.

Senator DECONCINI. Now, in doing that, please answer. In that kind of a situation, that is the cost you consider that the court assess?

Mr. SIEGAN. Well, let us put it this way. If there is a question of gender and that question, I assume, has been looked at by the administrative agency, and looked at by the administrative agency possibly in terms of how much money it will have to serve its commitment best, to serve its charge best—the court comes along and says, no, you have got to do it this way. People are not going to be benefited who ordinarily might be benefited, and that, I think, is something that should be considered in these cases.

Senator DECONCINI. But if you have the constitutional right of an individual before you—well, does this imply that you believe men maybe have lost because women have gained some measure of equality?

Mr. SIEGAN. I certainly do not want to think that, Senator. I am talking specifically——

Senator DECONCINI. But you are laying out a situation that that could happen.

Mr. SIEGAN. A specific situation where—in all these cases, they were argued by well-meaning people. In the cases I mention, the government argued that its program was the better program. Joseph Califano was a defendant in some of these cases; argued that the program that the government planned would help people more than what was being proposed.

Senator DECONCINI. I understand. What I guess troubles me, Mr. Siegan, is that if I follow your line of reasoning, you say you would not sell your first amendment rights or equality under the law rights for anything, and that is very encouraging because I do not think those things are for sale.

And then you say that you must assess or consider the costs in making a judgment that would relate, say, to sex discrimination, and I have a little trouble having those two not be in contradiction because if a constitutional right is there under the Equal Protection Clause of the 14 amendment, and even though there is a cost

and even though it were a loss to another class that is already perceived and adjudicated to be covered by it, is it not the constitutional interpretation that the cost is not the issue? The issue is whether or not there is equal protection.

Mr. SIEGAN. I certainly agree with that, but I do want to inject this element. There are no absolute rights in our Constitution. Much as we may not like the idea, speech is not absolute, religion is not absolute, property is not absolute.

Courts are continually limiting rights which many of us say should never be limited. That is the process. If all rights were absolute, we would have anarchy. Courts are continually saying speech goes so far, gender rights go so far. Not all gender cases are decided on the basis of a certain perspective.

What I am saying here is this should be considered, this element should be considered in the court coming through with a decision, with the understanding that we simply—we may like the idea that rights are absolute, but no rights are absolute. That is the process that we have.

Senator DECONCINI. Is it fair to say that part of your judgment or part of the equation is the cost, but how much is it? Is it the predominating amount or predominating part of a decision on a constitutional basis of, say, equal protection or is it just one of several?

Mr. SIEGAN. Well, as an academic matter, of course, I do not want money to limit people's rights, and I think that is what I would put to you. If it comes to rights and it comes to money, there is a—I want my rights. That is the greatness of this society.

At the same time, I recognize that almost every day in the week the Supreme Court does limit somebody's rights.

Senator DECONCINI. Yes. I do not deny that. My problem is how much emphasis you place on that judgment of cost as to the constitutional right.

Mr. SIEGAN. Well, let me put it this way. If you said to me, would you—as I have said, I do not think any price—this is a personal matter, if you talk that way. I would not sell my gender rights, my speech rights for almost anything.

In a society where these terrible decisions have to be made at times, we may have to look at that, but I again want to emphasize that is a secondary concern. The right is the important thing.

Senator DECONCINI. Is it correct that in the past you have been critical of the Supreme Court's decisions that have upheld the government's rights to regulate commerce, such as health and safety laws and labor laws?

Mr. SIEGAN. I guess what you are referring to is what I—the theme of this book.

Senator DECONCINI. That is right.

Mr. SIEGAN. The theme of this book is that some people value property rights, value economic rights very highly. The Supreme Court for a lengthy period of time has not protected those rights.

The theme here is that the Supreme Court, which has applied a minimal standard of review to economic and property activities, should raise that standard of review to an intermediate level, no more than that; not a strict level, just an intermediate level.

At times, I think that would be protective of individual property rights and of economic rights; at times, it would not. At the present time, there is no protection in the Constitution, which we all think protects individual rights, for people who want to engage in economic activity.

Now, the things I personally want to do are protected in the Constitution, and I have told you speech, privacy, religion. But that is not true for people who want to enter into business, who want to engage in business without horrendous consequences. It is simply my point these are people, these are Americans. They are entitled to engage in an activity.

Senator DECONCINI. What do you believe is the Federal Government's proper role in regulating business?

Mr. SIEGAN. I cannot tell you that except as an offhand generalization. What I am talking about here is the Court. The purpose of our Supreme Court is to protect individual rights. That is a basic, fundamental position of—that is its assignment.

It does not protect, in my view—and I have set this forth in a rather lengthy way—it does not sufficiently protect economic and property interests.

Senator DECONCINI. Well, you think the Supreme Court is wrong, then, in its decisions that have upheld the government's right to regulate commerce?

Mr. SIEGAN. In some cases it has been correct. I think the difference is the Supreme Court should scrutinize when regulations are imposed in the economic and property area. The Supreme Court should scrutinize to see if there has been a serious error, if there has been arbitrary——

Senator DECONCINI. You are not suggesting the Supreme Court has to find a constitutional right to justify the regulation of health and safety laws?

Mr. SIEGAN. Well, health and safety laws obviously would be of the highest legislative priority.

Senator DECONCINI. Right, and so——

Mr. SIEGAN. But there are other—again, Mr. Chairman, the point I want to make is that the Court, in my view, should be scrutinizing and giving it an intermediate level of scrutiny, not a strict level of scrutiny, but should be scrutinizing controls on economic activities.

It does not do so at the present time, and just to bring in what I have said before, as a judge the kind of conversation we are having now is totally irrelevant because that is not the situation.

Senator DECONCINI. Well, I am not so sure it is irrelevant. If you are presented with a case where the legislative body has taken some action to protect the worker or to protect the business place, what is important to me is whether or not you feel the Supreme Court, number one, should hear the case and, number two, based on some of your criticism, that the Supreme Court ought not to be involved in regulating commerce, so the Supreme Court maybe should not consider itself here.

Certain libertarians—certainly, what I have read of libertarian works seems to leave that distinct impression. The marketplace is free and the government should stay out of it and the courts should stay out of it.

Mr. SIEGAN. Well, I do not know if that is quite correct, but let me put it this way.

Senator DECONCINI. Please correct me.

Mr. SIEGAN. I do not know.

Senator DECONCINI. I do not want to misquote the libertarians.

Mr. SIEGAN. I think we are confusing my view as an individual about the political scene and my view as a constitutional lawyer. Those are very different. I might be anxious to see a certain result. I would not dream of having that result achieved through the Constitution.

And I think you are suggesting that because I see a certain world that I will be influenced in making decisions. I think we all are influenced to some extent by our background, by our experience.

Now, let me be specific at the present time. If a case comes up involving economic liberties, I think as a judge I would feel it is my obligation to say that is not protected here; there is nothing I can do for you. If you need help, go see the legislature.

While I may have the greatest sympathy for that situation, that is not my role. I would be denying my oath. I am not there to impose libertarian objectives on society.

Senator DECONCINI. Well, let us get away from libertarians. What about legislation dealing with safety, and it comes before you to interpret what standards should apply for the safety of underground miners? How do you approach that when you indicate that the Supreme Court ought not to make decisions relating to commerce?

Mr. SIEGAN. Well, the "ought not" disappears from my judgment. The "ought not" has no relation. I am——

Senator DECONCINI. Because it has?

Mr. SIEGAN. Pardon me? It has.

Senator DECONCINI. Because it has, and that is it?

Mr. SIEGAN. The sole question is that—let us say that case comes up. I would, as a legal researcher, as a legal analyst, look to see what the Supreme Court has said in that particular situation.

Senator DECONCINI. And be bound by that?

Mr. SIEGAN. Yes. I would try to write an opinion that will be upheld by the U.S. Supreme Court. I am not there to tell the world how it should run. Appeals court judges have power, but not that kind of a power. They basically have to be consistent with what the Supreme Court says.

So what purpose would it be for an appeals court judge to write an opinion which will be thrown out by the Supreme Court? Now, it is true not all the cases come up to the Supreme Court, but many of them do, and I think my record of integrity—I will put it this way: I am an honorable man. I would not dream of imposing my will over that of the U.S. Supreme Court.

Senator DECONCINI. I am not suggesting anything other than that you are an honorable man, Mr. Siegan. I know you and I know your reputation and served with you on the Bicentennial Commission. So I do not want my questions to be left with any impression as to impugning your integrity. That is not the purpose of my questions, let me assure you.

What I want to know is what kind of a judge you are going to be.

Mr. SIEGAN. I understand that, sir.

Senator DECONCINI. And I only wish that we on this committee spent far more time asking these types of questions.

Mr. SIEGAN. I appreciate that, sir.

Senator DECONCINI. The only reason I am doing this is it was, quite frankly, the only way I thought I could get you a hearing. And in doing so, I want to ask the questions, and if I had Mr. "X" or Mr. Blow or Ms. "X" or Blow before me, I would ask these questions, too. Unfortunately, I do not do it. Enough of it.

Senator Metzenbaum cannot be here this afternoon and he has put some questions here, nine of them, in point, dealing with the Constitution, and I would like to submit them to you and ask you to respond to them for the record.

[Response to questions follow:]

University of San Diego

School of Law

November 11, 1987

Senator Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
The Capitol
Washington, DC 20510

Dear Senator Biden:

For your information I enclose copies of materials I am submitting to Senator Metzenbaum in connection with my nomination to the Ninth Circuit Court of Appeals.

Sincerely,

Bernard H. Siegan
Distinguished Professor
of Law

BHS/rg
Enclosure

SENATOR METZENBAUM'S QUESTIONS TO BERNARD SIEGAN

1. PROFESSOR SIEGAN, THIS YEAR YOU PUBLISHED A BOOK CALLED THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY. DO YOU BELIEVE THAT THE FOURTEENTH AMENDMENT SOLELY COMPREHENDED CIVIL RIGHTS AND NOT SOCIAL PRIVILEGES, VOTING, OFFICE HOLDING, JURY SERVICE, PUBLIC SCHOOLINGS, OR OTHER POLITICAL RIGHTS? WHAT ARE THE IMPLICATIONS OF THESE VIEWS FOR CURRENT SUPREME COURT LAW?

Answer: I conclude on the basis of my historical research that the 39th Congress, framers of the Fourteenth Amendment, drew the distinction described in the question. The Supreme Court has rejected this distinction, and has entered many rulings contrary to it. I stated in my book Economic Liberties and the Constitution (pg. 318), that existing and long established judicial policy should not be abandoned

> without strong, compelling reasons. As Robert McClosky has observed, "The American Constitution is not merely the document of 1789; it also comprises the judgments attached to it by subsequent generations."

Under the foregoing standard, I conclude that existing precedent making the Fourteenth Amendment applicable to social privileges, voting, office holding, jury service, public schooling and other political rights should be maintained. As a circuit court judge, I would apply existing precedent regardless of my view in the matter.

2. YOU'VE SAID THAT "ALTHOUGH SUCH SEGREGATION IS TOTALLY REPUGNANT IN MODERN SOCIETY, IT DOES NOT FOLLOW THAT THE

CONSTITUTION NECESSARILY PROVIDES RELIEF IN THIS AREA." YOU ALSO HAVE SAID THAT THE COURT'S USE OF EQUITABLE POWER TO PROVIDE REMEDIES FOR SCHOOL DESEGREGATION HAS BEEN IMPROPER. ARE THESE YOUR VIEWS TODAY?

Answer: (a) The quoted portion is another way of saying that the Constitution does not provide a remedy for all wrongs. It is an assertion found in constitutional law opinions. Thus, often quoted is Justice White's statement in his majority opinion in Lindsey v. Normet: "[T]he Constitution does not provide judicial remedies for every social and economic ill."

(b) I have not said that the court's use of equitable power to provide remedies for school desegregation is always improper. Equitable relief to remedy legal and constitutional violations is not improper. Equitable relief imposed for this purpose in the desegregation cases is not constitutionally objectionable. My criticism relates to the use of this power beyond curing constitutional fault to require integration. The opinions in Green, Swan and Keyes accept this distinction.

WOULD YOU APPLY THESE VIEWS TO CASES WHICH COME BEFORE YOU? AS A CIRCUIT COURT JUDGE, WOULDN'T YOU BE IN A POSITION TO IMPLEMENT YOUR LIMITED VIEW OF EQUITABLE POWER?

Answer: The authority of a circuit court judge is defined by rulings of the Supreme Court. A circuit court judge who rejects limits, or exceeds these rulings would be acting in violation of the oath of office. Accordingly, as a judge I would not seek to implement my personal views on equitable power.

3. YOUR WRITINGS SUGGEST THAT YOU DO NOT BELIEVE IN THE SUPREMACY OF SUPREME COURT DECISIONS. DO YOU BELIEVE THAT SUPREME COURT DECISIONS ARE BINDING ON THE LOWER FEDERAL COURTS?

Answer: I have never written or stated that Supreme Court decisions are not supreme. I have always held the view that the Supreme Court is the final authority in the interpretation of the Constitution and its decisions are binding on all other federal and state courts.

4. YOU HAVE ALSO OBJECTED TO THE DECISIONS OF THE SUPREME COURT WHICH APPLY THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE STATES. YOU HAVE SAID THAT "[T]HE U.S. SUPREME COURT HAS NEVER AUTHORED A MAJORITY OPINION THAT PROVIDES A REASONED EXPLANATION FOR WHY THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE INCORPORATES THE ESTABLISHMENTS PROVISION." ARE THESE YOUR VIEWS TODAY?

Answer: As a matter of scholarly research, I conclude that the Fourteenth Amendment of the Constitution incorporates the free exercise clause but not the establishment clause. In my opinion, no Supreme Court decision has analyzed in great depth the incorporation of the establishment clause and responded to views such as Professor Edward Corwin, the noted constitutional scholar, and I have presented. The court's holding incorporating the establishment clause is an enormously important one, which, I think, requires much more analysis and explanation than it has received from the court.

CAN YOU OFFER LEGAL REASONING WHICH SUPPORTS THE INCORPORATION OF THE ESTABLISHMENT CLAUSE AND THE APPLICATION OF THAT CLAUSE TO THE STATES?

Answer: Yes. The issue revolves about determining if the framers regarded the establishment clause as protecting liberties. While based on my historical research I am not persuaded of this, one can seriously argue that the framers intended to incorporate the first eight amendments as a whole, and were not concerned about protecting only the liberties set forth in those amendments. Moreover, one may regard the establishment clause as protecting liberty not necessarily covered by the free exercise clause, and therefore incorporated as a guarantor of liberty.

5. YOU HAVE ALSO STATED THAT "NOT EVERY ESTABLISHMENT OF RELIGION IS A VIOLATION OF FREEDOM."

Answer: In the quote, I use the words establishment as government aid to or advancement of religion. Many programs with this purpose or effect, have been upheld as not in violation of the free exercise or establishment clauses. Thus, the court by 5-4 sustained in Everson v. Board of Education New Jersey's program of reimbursing parents for money spent to transport their children to parochial (as well as to public and parivate nonsectarian) schools. Justice Black's majority opinion held that although they aided religious education, these state expenditures did not violate religious freedom.

WHAT IS YOUR GENERAL VIEW OF THE ESTABLISHMENT CLAUSE?

Answer: The establishment clause was intended in Justice Joseph Story's words "to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government." This is consistent with the explanation given by James Madison, when he submitted to the First Congress the amendments that later became the religion clauses of the First Amendment.

HOW DOES YOUR VIEW DIFFER FROM CURRENT SUPREME COURT LAW?

Answer: Under the establishment clause, any action by government that has the purpose or effect of "advancing religion" or that causes "excessive entanglement" between church and state, is unconstitutional. This is known as the Lemon test and in my view may often cover a broader area than was intended.

6. YOUR WRITING SEEM TO SAY THAT ESTABLISHMENT CLAUSE SHOULD NOT PRECLUDE PRAYER IN THE SCHOOLS? DO YOU STILL HOLD THIS VIEW?

Answer: Prayer that violates religious liberty would be prohibited under the free exercise clause, which I consider as incorporated in the Fourteenth Amendment. My historical analysis concludes that the Framers did not intend to incorporate the establishment clause in the Amendment. Accordingly, the establishment clause by itself does not forbid prayer in local schools. I agree with Professor Corwin, that it "is only liberty that the Fourteenth Amendment protects," and not separation.

HOW WOULD YOU APPLY YOUR VIEW ON THIS ISSUE TO SCHOOL PRAYER CASES?

Answer: On this issue my academic analysis is contrary to existing Supreme Court precedent. As will be the case in all matters submitted to me for decision as a judge, I will apply existing Supreme Court precedent and certainly not my own academic positions.

7. SOME OF YOUR WRITING SUGGEST THAT YOU REJECT THE INCORPORATION DOCTRINE. DO YOU REJECT THE INCORPORATION DOCTRINE?

Answer: Existing incorporation doctrine assumes selective, not total incorporation of the first ten amendments. In my view, the Fourteenth Amendment provides for a broader incorporation. As a historical matter, I believe the 39th Congress intended to incorporate all the liberties safeguarded in the first eight amendments. I also believe that the Ninth Amendment is largely coterminous with the due process clause of the Fourteenth Amendment, and that both are strong guarantors of individual rights.

8. IN YOUR BOOK, ECONOMIC LIBERTIES AND THE CONSTITUTION, YOU SAY THAT WELFARE AND REGULATORY LEGISLATION IS "ECONOMICALLY HARMFUL." YOU SAY THAT THE COURTS SHOULD MORE RIGOROUSLY SCRUTINIZE THIS KIND OF LEGISLATION TO INSURE THAT EFFICIENT AND EFFECTIVE STATUTES ARE RETAINED. YOU HAVE SAID THAT "CONTEMPORARY CONSTRUCTION OF THE FEDERAL CONSTITUTION THAT PREVENTS ITS APPLICATION TO RESTRICTIONS UPON ECONOMIC ACTIVITY IS ERRONEOUS AND SHOULD BE CORRECTED."

ISN'T YOUR VIEW CONTRARY TO LONG-ESTABLISHED SUPREME COURT PRECEDENT. IF YOU ARE CONFIRMED, HOW WILL YOU APPLY YOUR VIEWS

ON THIS ISSUE TO CASES WHICH INVOLVE THE REVIEW OF WELFARE AND REGULATORY LEGISLATION AND REGULATIONS?

Answer: I have never said or suggested that all welfare and regulatory legislation is harmful. Much of it is essential and beneficial. It does not seem unreasonable that the Supreme Court review such legislation under an intermediate standard of scrutiny, one which would give substantial but not complete deference to the legislature. This position is consistent with the role of the court to protect individual liberties. However, here, as in all other areas, I would rule as my oath of office requires, fully consistent with the law of the land, as interpreted by the Supreme Court.

9. YOU HAVE RECENTLY WRITTEN THAT THE SUPREME COURT ERRED WHEN IT DECIDED MCCULLOCH V. MARYLAND. DO YOU AGREE THAT MCCULLOCH V. MARYLAND IS THE FOUNDATION UPON WHICH CONGRESSIONAL POWER TO ENACT WELFARE AND REGULATORY LEGISLATION RESTS? WHAT WOULD HAPPEN TO CONGRESSIONAL LEGISLATION IF THE COURTS ADOPTED YOUR VIEWS? WILL YOU APPLY YOUR VIEWS ON MCCULLOCH TO CASES WHICH COME BEFORE YOU?

Answer: My discussion of McCulloch v. Maryland is strictly historical. I have never urged reversal of this decision--nor do I now. As your question indicates, this 1819 case is the basis for much welfare and regulatory legislation. Reversing it now is unthinkable in view of the enormous amount of legislation premised on it. As a circuit court judge, I would be bound to apply its precedent as well as those of the many opinions

premised on it.

Senator DECONCINI. I have no further questions. I would be glad to yield to the Senator from New Hampshire.

Senator HUMPHREY. Thank you, Mr. Chairman.

Professor, as you know, there has been some concern raised about your critique of the *Brown* v. *Board of Education* decision. I think, if I am not mistaken, the controversy arose, or at least was stimulated in recent times, this year, the spring of this year, by an article or a report, I guess it was, in a Washington publication, "The Legal Times," which quoted you—am I correct, incorrectly quoted you and attributed the comments of some other person to you incorrectly?

That article was written by David Boaz, is that correct, the article in "The Legal Times?"

Mr. SIEGAN. No. That was written by Terry Moran.

Senator HUMPHREY. But David Boaz——

Mr. SIEGAN. He apparently supplied the information to Terry Moran upon which that article was based.

Senator HUMPHREY. David Boaz provided some information to Terry Moran——

Mr. SIEGAN. That is right.

Senator HUMPHREY [continuing]. Which Moran quoted as being your words, which they, in fact, were not. They were the words of someone else. Boaz later tried to clear the air and in an interview with the San Diego Union published March 1 of this year, Mr. Boaz stated, "I created a problem by falsely attributing the comments of someone else to Professor Siegan."

Am I interpreting the chronology and the facts correctly?

Mr. SIEGAN. Yes, that is about it, yes.

Senator HUMPHREY. Nonetheless, of course, you have written a critique of the *Brown* v. *Board of Education*——

Mr. SIEGAN. In this book, in this book, not in the article that is referred to.

Senator HUMPHREY. Exactly, yes, much earlier. In what year was that?

Mr. SIEGAN. It just came out in 1987.

Senator HUMPHREY. Now, you say in that book, do you not, that—I recognize I am taking this out of context. I am not trying to do so unfairly, but I want to address the point. You say in that book, do you not, that there is no fundamental or natural right to education, is that correct?

Mr. SIEGAN. That is correct. That is quoting, again, the two cases, the *Rodriguez* case and the *Plyler* case——

Senator HUMPHREY. Yes.

Mr. SIEGAN [continuing]. Opinion by Justice Powell and opinion by Justice Brennan.

Senator HUMPHREY. Exactly, and I noted that the Chairman was uncomfortable to the point where he raised this matter with you. He referred to the fact that you had said that there is no fundamental right to education. And, indeed, of course, that is not an original observation with you, for Justice Brennan in *Plyler*, as you said a moment ago, said, quote, "nor is education a fundamental right," and so on. That is taking it out of context, just as someone has taken you out of context, but that observation is not original with you.

What was the other case in which you said the Court has stated the same?

Mr. SIEGAN. The two cases. One was the *Rodriguez* case and the other was the *Plyler* case.

Senator HUMPHREY. *Rodriguez*. You have no problem with the result of *Brown* v. *Board*?

Mr. SIEGAN. No. I fully agree with the judgment in *Brown* v. *Board of Education*.

Senator HUMPHREY. You disagree with the Court's analysis or reasoning, and this is an area that obviously and rightly concerns a great many people and it is a matter about which there can easily be misunderstandings and unjustified fears.

And so I would ask at this point that you elaborate on your views of *Brown* v. *Board of Education*, how the Court should have ruled, what a better rationale is, and what the constitutional underpinnings are, in your view, that provide a right to equal access to education, which is I guess the way you approach it.

Mr. SIEGAN. Well, I want to emphasize the judgment—I fully agree with the judgment in *Brown* v. *Board of Education*. It is inconceivable to me that any other judgment could have been arrived at. Our society is enormously indebted to that judgment, and I support it as strongly as I can. I do not know of any principle of constitutional law I would support more.

However, the reasoning is where I differ, and I am not unique in that. *Brown* v. *Board of Education* is a very controversial case. People may agree with the judgment, but an enormous number of commentators disagree with the reasoning. How do you get there? How do you arrive at the position that segregation in the southern schools was unconstitutional?

Well, the Court did it in a way that I think violated separation of powers. The Court, instead of finding a fundamental liberty, in effect, found that it had power to monitor the school boards in the States as to how they should administer and manage the schools.

And so I read *Brown* v. *Board of Education* as an instance of the Court saying we have the authority to monitor and to administer—or to monitor the administration and management of the schools. I think that is inconsistent with my view of Supreme Court power.

What I have said is a fundamental right was involved in the denial of access to black children to go to white schools. When we talk that way, right of access, we are invoking a fundamental right, the right of travel. The right of travel does not appear in the Constitution, but it has been long accepted by the Supreme Court. The right of travel appears as far back as 1823 in cases.

It is my view that the right of travel was violated by the school segregation laws, and that therefore, since that occurred, the school segregation laws were wrong. Now, what do I mean by right to travel?

Right to travel involves on a broad scale the right of an individual to have access to any part of this country. That is what this country is. It is one big country, so that someone who may live in California, has the right of access under the Constitution to go and live in New Hampshire, in Arizona, wherever.

Using the same reasoning, an individual has a right to go to a city to live. Certainly, a city cannot say you cannot come here to

live because you are black. It is the right of travel that is involved in going to a city; similarly, to a park.

It happens that the Supreme Court now says that a reporter has the right of access to attend a trial to cover a criminal case. So we see the right of travel starting from a broad area going down to a very specific situation. Many of the Justices feel that reporters have a right of access to jails to interview prisoners, to look at conditions in the jail.

I believe that a black child had a right of access to a school, to attend that school on the same level with the same status exactly as any other child who attends that school, and that is where I come to saying that, in my view, the segregation situation in the South violated this fundamental right of a black child to attend a school on the same basis as anybody else, including the white children that were there.

Senator HUMPHREY. So you include in this right of travel the right of access?

Mr. SIEGAN. The broad term is right of travel, but parts of it is access. It is entry, it is—we can cut it down.

Senator HUMPHREY. When we think of travel, we think of travel between geographical points, but you are saying travel and access within an institution?

Mr. SIEGAN. Yes. Well, I would say the word "access" can be used in many situations involving the right of travel; not always, but the broad term is "right of travel." Within that is the right of access.

Senator HUMPHREY. So then in a sense you would seem to have a more expansive reading of the liberty component of the Due Process Clause than did the Court in that case?

Mr. SIEGAN. That might be so. I do not know whether I can agree with that, but it is possible to judge from that that that is so.

Senator HUMPHREY. Can we establish whether this is the last hearing, Mr. Chairman?

Senator DECONCINI. I can only advise the Senator from New Hampshire that I have no desire to extend the hearings, or I would do them now with my questioning. I have no others.

I have submitted questions from Senator Metzenbaum. I cannot tell the Senator from New Hampshire whether or not anyone will request further hearings or not.

Senator HUMPHREY. Well, again, I thank the Chairman for stepping forward, which he literally did when no one else would, frankly, and moved this hearing up by some number of weeks. I thank the Chairman for that.

Senator DECONCINI. I am satisfied. You know, I have pursued it as much as I want to and I am prepared to make my judgment on the nominee, and I cannot speak for other Senators, but I think that we ought to process these. As you know, my position is not to hold them up. If a majority wants to turn them down, turn them down. If they want to vote them out, vote them out.

Senator HUMPHREY. Indeed, indeed.

Senator DECONCINI. I think Mr. Siegan is entitled to that, just as you expressed at the very beginning.

Senator HUMPHREY. Well, Mr. Chairman, finally, are you able to share with us at all the agreement between you and Senator Biden

and/or Senator Leahy or other Senators about whether this hearing today would constitute the entirety of the——

Senator DECONCINI. I cannot share anything with you because I do not have anything to share. As you know, there was not any great rush to have this hearing by some members of the committee, and I guess on my insistence, and perhaps yours and others, the Chairman graciously acceded that if someone could be found on the majority to chair the hearings, they would take place.

I have an ample record here for me to make my judgment and to make a recommendation to the committee, but I am not in a position to bind the Chairman or Senator Leahy, who is the ad hoc chairman, I guess, of the reviewing task force.

I will express my views at committee regarding further hearings, but I cannot say anything more than that. I wish I could satisfy the Senator.

Senator HUMPHREY. Well it is not so much a matter of satisfying the Senator as it is the committee doing right by a citizen who is a nominee to an important position.

Senator DECONCINI. Well, if the Senator would yield, I agree with that to a certain extent, but I also respect the right of Senators that want to pursue a matter. I do not condone dilatory tactics in doing that, but I certainly respect anyone on the majority or minority to want to pursue it, and that is why we vote in committee.

Senator HUMPHREY. I thank the Chairman.

Senator DECONCINI. Thank you, Mr. Siegan, very much for your forthrightness and your taking the time to go into many of the areas of my concern. I thought you were very candid and forthcoming.

This committee will stand in recess to the call of the Chairman.

[Whereupon, at 3:52 p.m., the committee was adjourned.]

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James H. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4100
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewett
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
James Sterbower
International Square
Suite 1275
1875 Eye Street, N.W.
Washington, DC 20006

BOARD OF GOVERNORS
LIAISON
Sharp Whitmore
2005 Gird Road
Fallbrook, CA 92028

STAFF DIRECTOR
Wayland L. Sandel, Jr.
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5685

STAFF ASSISTANT
Diane Livingston
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5701

AMERICAN BAR ASSOCIATION **Standing Committee on Federal Judiciary**
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

September 14, 1987

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: FRANKLIN S. VAN ANTWERPEN
United States District Court
for the Eastern District of Pennsylvania

Dear Senator Biden:

Thank you for affording the Committee an opportunity to express an opinion pertaining to the nomination of Franklin S. Van Antwerpen for appointment as Judge of the United States District Court for the Eastern District of Pennsylvania.

Our Committee is unanimously of the opinion that Judge Van Antwerpen is "Well Qualified" for this appointment.

Sincerely yours,

Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

FRANKLIN S. VAN ANTWERPEN

Birth:	October 23, 1941	Passaic, New Jersey
Legal Residence:	Pennsylvania	
Marital Status:	Married	Kathleen V. O'Brien 3 children
Education:	1960 - 1964	University of Maine B.A. degree
	1964 - 1967	Temple University School of Law J.D. degree
Bar:	1969	Pennsylvania
Experience:	1968 - 1970	Hazeltine Corporation Corporate Law Department Lawyer
	1970 - 1971	Northampton County Legal Aid Society Chief Counsel
	1971 - 1979	Hemstreet, Smith and Van Antwerpen Associate (1971-1973) Partner (1973-1979)
	1971 - 1979	Solicitor, Palmer Township
	1979 - present	Judge, Court of Common Pleas of Northampton County
Office:	100 North Third Street Suite 400 Easton, Pennsylvania 18042 215 252-6522	
Home:	15 Ridgewood Road Easton, Pennsylvania 18042	

To be U. S. District Judge for the Eastern District of Pennsylvania

HON. FRANKLIN S. VAN ANTWERPEN

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Franklin Stuart Van Antwerpen (no other names used).

2. Address: List current place of residence and office address(es).

OFFICE:	HOME:
100 North Third Street	15 Ridgewood Road
Suite 400	Easton, PA 18042
Easton, PA 18042	(215) 252-6595
(215) 252-6522	(215) 252-6588

3. Date and place of birth.

October 23, 1941, Passaic, New Jersey.

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Married on September 12, 1970, to Kathleen Veronica O'Brien. Spouse's occupation: Housewife.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Sept. 1960-June 1964, University of Maine, June 5, 1964, B.S. in Engineering Physics.
Sept. 1964-June 1967, Temple University School of Law, June 15, 1967, J.D.
June 1980-July 1980, National College of the Judiciary, University of Nevada, Reno, Nevada, graduate of Full General Jurisdiction Session.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1968-1970, Corporate Law Department, Hazeltine Corporation, Greenlawn, L.I., New York, 11740. Served as manager and contracts lawyer.
1970-1971, Chief Counsel, Northampton County Legal Aid Society, now known as Lehigh Valley Legal Services, 5th and Walnut Streets, Allentown, PA, 18101. Served as full-time legal aid lawyer.
1971-1979, Law Firm of Hemstreet, Smith and Van Antwerpen, 701 Washington Street, Easton, PA, 18042.
1979-present, selected by local Merit Selection Committee to serve as Judge of the Court of Common Pleas of Northampton County, Pennsylvania. Elected judge in 1981.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No active military service. From 1960-1962 served in college U.S. Army Basic R.O.T.C. with rank of Cpl., no serial numbers were issued. In 1967, passed tests to serve as U.S. Navy Air Intelligence Officer (Ens.) but I did not serve because of my civilian job position at Hazeltine Corporation.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

At the University of Maine I was an associate member of Sigma Pi Sigma, Physics Honor Society.
At Temple University School of Law because of my upper 1/4 class rank at the end of the first year, I was selected as a Freshman Advisor and as a Justice of the Moot Court.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Member of American Bar Association
Member of American Judicature Society
Member of Pennsylvania Conference of State Trial Judges
Member of Pennsylvania Bar Association
Member of Northampton County Bar Association
Former Member of American Trial Lawyers Association

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not belong to any organizations that are active in lobbying. I am a member of the following organizations:

Member of United States Naval Institute
Member of Northampton County Historical Society
Member of Easton Elks Lodge #121
Member of Easton Moose Lodge #45
Member of Pomfret Club
Member of Lafayette Lodge F.&A.M. #795
Member of Lehigh Consistory Ancient Accepted Scottish Rite
Member of Rajah Temple
Member of Goodfellows Club

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

U.S. Supreme Court, May 22, 1972
U.S. Third Circuit Court of Appeals, May 7, 1971
U.S. District Court for the Eastern District of Pennsylvania, January 6, 1971
Pennsylvania Supreme Court, April 28, 1969
Pennsylvania Superior Court, June 13, 1969
Pennsylvania Commonwealth Court, November 30, 1970
Court of Common Pleas of Northampton County, August 17, 1970

(None of the above admissions has lapsed).

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None, other than published legal opinions.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is excellent. My last physical examination was on July 9, 1987.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Judge, Court of Common Pleas of Northampton County, Pennsylvania (Third Judicial District). Selected by Non-Partisan Merit Selection Committee, nominated by Governor and confirmed, unanimously, by Senate in 1979. Sowrn in as judge in 1979. Received endorsement of both political parties in 1981 and elected without opposition to a full ten year term. No other judicial office other than the present one has been held.

The Court of Common Pleas is a general jurisdiction trial court of record which hears all types of cases, both civil and criminal. We do not assign our judges to one specific division of the court (i.e., civil, criminal). Criminal matters range from misdemeanors to first degree murder. Civil matters are without a dollar limitation on jurisdiction.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

(1) Most Significant Opinions

(a) Commonwealth of Pennsylvania v. Stanley J. Hertzog, (1987) Court of Common Pleas No. 1084, 1085, 1086-1986 - court upholds death penalty in three count first degree murder case. (Copy attached as Exhibit A; not published because of length of opinion).

(b) Capuano v. Echo Bicycle Co., Inc., et. al., (1982) 27 D.&C.3d (Pa.) 524, 46 North. Cty. Reptr. (Pa.) 89 - case of first impression, substantial jury verdict, problem of apportionment between multiple negligence and strict liability defendants is addressed. Settled on appeal. Opinion adopted by Third Circuit Court of Appeals, 790 F.2d 22, 24, and Pennsylvania Superior Court, 513 A.2d 403, 408.

(c) Re: Estate of John M. Snettler, Deceased, (1985) 4 Fiduc. Rep.2d (Pa.) 336, 46 North. Cty. Reptr. (Pa.) 142, see also Fiduciary Review, January, 1985, p.3 - forged will invalidated. Appeal dismissed.

(d) Angle v. Easton Publishing Co., et. al., (1984) 33 D.&C.3d (Pa.) 315 - defamation suit, freedom of press protected by the United States Constitution. Not appealed.

(e) Commonwealth of Pennsylvania v. Bernard Hude, (1980) 44 North. Cty. Reptr. (Pa.) 214 - loud music is not constitutionally protected speech. Affirmed and adopted in part on appeal, 55 Pa. Commw. 1, 423 A.2d 15 (1980).

(f) Re: Estate of Dominic L. Falcone, (1983) 27 D.&C.3d (Pa.) 540, 46 North. Cty. Reptr. (Pa.) 1[illegible] validity of trust for any political c[illegible] opposing testator's "worst enemy" disc[illegible] Not appealed.

(g) Commonwealth of Pennsylvania v. Leonar[illegible] Keith, (1981) 18 D.&C.3d (Pa.) 627, 45 North. Cty. Re[illegible] (Pa.) 66 - on arrest there is not the same expectation of privacy on a driveway as in a dwelling. Not appealed.

(h) Fairchild v. Schomp, (1982) 23 D.&C.3d (Pa.) 227, 44 North. Cty. Reptr. (Pa.) 8 - court refuses to follow earlier Pennsylvania policy and enjoin natural nuisances. Not appealed.

(i) Commonwealth of Pennsylvania v. Mark J. Stout, (1981) 45 North. Cty. Reptr. (Pa.) 95 - out of court statements are not hearsay if the declarant is in court and subject to cross-examination. Affirmed on appeal.

(j) Commonwealth of Pennsylvania v. William J. Sandor, (1983) Court of Common Pleas No. 1040-1983 - jury's first degree murder verdict upheld (blows upon a small child can show an intent to kill sufficient for first degree murder). Affirmed on appeal. (Not published because of length of opinion).

(2) Summary of Reversals or Criticism:
(Unless noted, decisions are not published or reported)

(a) Fike v. Brynildsen, No. 1357 C.D. 1981 - the Commonwealth Court vacated the Court of Common Pleas review of a zoning hearing board decision and remanded so the zoning hearing board could make a better record.

(b) Fritchman v. Fritchman, et. al., No. 3076 Philadelphia 1982 - the Superior Court affirmed the Court of Common Pleas award of custody but modified the lower court's order to allow immediate visitation prior to counseling.

(c) Columbian Rope Company v. Rinek Cordage Company, et. al., No. 2854 Philadelphia 1981 - the Superior Court affirmed part of the Court of Common Pleas decision but in a matter of first impression in Pennsylvania the Superior Court disregarded a Federal Western District of Pennsylvania Court decision and adopted the view that the term "concealed" in the Bulk Sales law means the same thing as "undisclosed".

(d) Commonwealth of Pennsylvania ex rel: Rita L. Falwell v. A. S. DiGiacinto, Warden of Northampton County Prison, No. 2466 Philadelphia 1981 - the Superior Court reversed a Court of Common Pleas finding of contempt when a defendant charged with wilful failure to pay child support came to court drunk.

(e) Gallo v. J. C. Penney Casualty Insurance Company, No. 2185 Philadelphia 1982 - the Superior Court reversed the Court of Common Pleas legal interpretation of the term "motor vehicle" in an insurance contract and held that the term also includes snowmobiles.

(f) Commonwealth of Pennsylvania v. Donald B. Hatch, No. 2388 Philadelphia 1982 - the Superior Court reversed a jury conviction of aggravated assault and carrying unlicensed firearms because one of the policemen who arrested the defendant was outisde his usual jurisdiction. After remand and suppression of evidence seized at the time of arrest, defendant was re-tried and again found guilty. In later decisions, the Superior Court has decided consistent with the Court of Common Pleas that extra-territorial arrests do not require suppression of evidence because constitutional rights are not involved.

(g) Commonwealth of Pennsylvania v. George Michael Pemberth, No. 330 Philadelphia 1984 - defendant was found not guilty by a jury of theft, but convicted of a lesser included offense of unauthorized use of a motor vehicle. The Superior Court declined to follow the well known dicta of its earlier decisions and held for the first time that unauthorized use of a motor vehicle is not a lesser included offense of theft.

(h) Gable v. Remington Arms Company, Inc., et. al., No. 53 T.D. 1983 - the Commonwealth Court in a matter of legal interpretation of a statute making official Department of Transportation accident investigations inadmissible in legal actions held that such investigations may nevertheless be reviewed on discovery. No precedent existed at the time of the decision of the Court of Common Pleas and the case upon which the Superior Court relied upon was decided after the lower court made its decision.

(i) Wambold v. Erie Insurance Company, No. 1554 Philadelphia 1985 - the Superior Court held as a matter of law that an insurance company is not responsible for paying uninsured motorist coverage if the insured has settled a bodily injury claim without the knowledge of the company. The court said "Since the (decision on which we rely) came down after Judge Van Antwerpen's decision, the trial court did not have the benefit of such authority."

(j) Parkinson v. Parkinson, No. 02659 Philadelphia 1985 - the Superior Court reversed the Court of Common Pleas acceptance of the recommendation of a hearing officer and award of support. The Superior Court held that the amount credited to appellee for income tax withholding was too high because appellee's actual taxes are less than the amount of the withholding.

(k) Moffitt v. Moffitt, No. 03083 Philadelphia 1985 - the Superior Court held that the Court of Common Pleas was incorrect in deciding that Florida, where a child lived, rather than Pennsylvania, should have jurisdiction in a Uniform Child Custody Jurisdiction Act matter. The Appellate Court carefully distinguished the existing case law upon which the lower court relied.

(l) Gallo v. Yamaha Motor Corporation, et. al., No. 01244 Philadelphia 1986 (Petition for Appeal to Pennsylvania Supreme Court filed in May, 1987) - the Superior Court reversed a substantial jury award of damages and held that the Court of Common Pleas should not have held that a state statute which would have prevented plaintiff from recovering did not apply in this case.

(3) Significant Opinions on State and Federal Constitutional Issues:

(a) Angle v. Easton Publishing Co., et. al., (1984) 33 D.&C.3d (Pa.) 315 - defamation suit, freedom of press protected by the United States Constitution. Not appealed.

(b) Commonwealth of Pennsylvania v. Bernard Hude, (1980) 44 North. Cty. Reptr. (Pa.) 214 - loud music is not constitutionally protected speech. Affirmed and adopted in part on appeal, 55 Pa. Commw. 1, 423 A.2d 15 (1980).

(c) Commonwealth of Pennsylvania v. Leonard W. Neith, (1981) 18 D.&C.3d (Pa.) 627, 45 North. Cty. Reptr. (Pa.) 66 - on arrest there is not the same expectation of privacy on a driveway as in a dwelling. Not appealed.

(d) Commonwealth of Pennsylvania v. Stanley J. Hertzog, (1987) Court of Common Pleas No. 1084, 1085, 1086-1986 - court upholds death penalty in three count first degree murder case. Copy attached as Exhibit A.

(e) Daniel Tilli v. Charles Spaziani, et. al., (1985) 42 D.&C.3d (Pa.) 100, Court of Common Pleas No. 1984-C-6395 - defamation suit, freedom of press, fair comment. Appeal dismissed.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

1971-1979, served as appointed Solicitor of Palmer Township, Northampton County, Pennsylvania.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I did not serve as a clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

I did not practice alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1968-1970, Corporate Law Department, Hazeltine Corporation, Greenlawn, L.I., New York, 11740. Served as manager and contracts lawyer.
1970-1971, Chief Counsel, Northampton County Legal Aid Society, now known as Lehigh Valley Legal Services, 5th and Walnut Streets, Allentown, PA, 18101. Served as full-time legal aid lawyer.

1971-1979, Law Firm of Hemstreet, Smith and Van Antwerpen, 701 Washington Street, Easton, PA, 18042.
1979-present, selected by local Merit Selection Committee to serve as Judge of the Court of Common Pleas of Northampton County, Pennsylvania. Elected judge in 1981.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

1968-1970, practice at Hazeltine Corporation involved the writing and review of government and other types of contracts. (Not admitted in New York).
1970-1971, practice as Chief Counsel of Legal Aid Society involved all types of civil litigation, including bankruptcy, defense of civil suits, and family law matters.
1971-1979, general practice of law involved prosecution of minor criminal charges as a municipal attorney, limited criminal law practice, and a general civil practice, including plaintiffs and defendants litigation, family law, and municipal law.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Former clients: Palmer Township, 1971-1979; Northampton County Council of Governments, 1975-1979; Northampton County Association of Tax Collectors, 1977-1979; Cement Belt Municipalities Association, 1975-1979; Palmer Township Business Industrial & Professional Association, 1976-1979, General counsel for the Fairview Savings and Loan Association, 1971-1979, and local counsel for the Blue Mountain Consolidated Water Company, 1976-1979.
Area of specialization: Municipal Law.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearance in court varied, describe each such variance, giving dates.

Appeared in court regularly from 1970 to 1979.

2. What percentage of these appearances was in:

(a) federal courts; 10%
(b) state courts of record; 60%
(c) other courts. 30%

3. What percentage of your litigation was:

(a) civil; 70%
(b) criminal. 30%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

(a) sole counsel; 30
(b) associate counsel. 10

5. What percentage of these trials was:

(a) jury; 20%
(b) non-jury. 80%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. Lafayette Trust Bank, Easton National Bank and Trust Co. and the Northampton National Bank v. Department of Banking and First Valley Bank, (1974) 13 Pa. Commw. 111, 318 A.2d 396, appeal to Supreme Court denied July 18, 1974 - represented First Valley Bank in extensive administrative hearings and appeals which established need and right of client, First Valley Bank, to locate branch office in Easton, Pennsylvania, and limited application of res judicata doctrine in administrative agencies.

(a) Matter was tried on numerous dates throughout the year 1973.

(b) Matter was tried before Examiners of the Pennsylvania Department of Banking, Harrisburg, Pennsylvania, and affirmed on appeal by Judge Wilkinson of the Commonwealth Court of Pennsylvania.

(c) The late George Coffin, Esquire, of Easton, PA, for Lafayette Trust Bank. Edward L. Symons, Jr., who is now with the University of Pittsburgh School of Law, 3900 Forbes Avenue, Pittsburgh, PA, 19260, telephone (412) 648-1386, for the Department of Banking. Roland Morris, Esquire, of Duane, Morris & Heckscher, One Franklin Plaza, Philadelhpia, PA, 19102, telephone (215) 854-6300, co-counsel for the First Valley Bank.

2. Palmer Municipal Sewer Authority v. Witty, et. al., (1976) 26 Pa. Commw. 117, 362 A.2d 1106 - represented Palmer Township in jury trial concerning validity of municipal liens. After final argument, court directed verdict, Commonwealth Court reversed holding double abutment lots benefited, Commonwealth Court reversed in 1978 by Supreme Court of Pennsylvania, 479 Pa. 240, 388 A.2d 306.

(a) Matter was tried for one week in 1975.

(b) Matter was tried in the Court of Common Pleas of Northampton County, Pennsylvania, before Judge Michael V. Franciosa.

(c) Herbert Toff, Esquire, of Easton, PA, for defendants Jack K. Witty and his wife (Mr. Toff is now retired and living in Florida). David A. Franklin, Esquire, of Pepper, Hamilton & Scheetz, 123 South Broad Street, Philadelphia, PA, 19109, telephone (215) 893-4521, co-counsel for appellants.

3. Commonwealth of Pennsylvania v. Township of Palmer, (1974) 16 Pa. Commw. 270, 329 A.2d 871 - represented Palmer Township in eminent domain proceeding in which the Appellate Court held municipalities are not entitled to damages for flooding type of taking under the Eminent Domain Code of United States or Pennsylvania Constitutions.

   (a) Matter was tried non-jury for one day in lower court in 1973 on stipulated facts.

   (b) Matter was tried in the Court of Common Pleas of Northampton County, Pennsylvania, before Judge Richard D. Grifo.

   (c) Opposing counsel was Lawrence R. Wieder, Assistant Attorney General, Legal Bureau, Department of Transportation, Harrisburg, PA (present address unknown).

4. Forks Township Municipal Sewer Authority v. American Land, Inc., (1972) 6 Pa. Commw. 569, 297 A.2d 185 - represented Forks Township Municipal Sewer Authority in case establishing right of municipalities throughout state to collect any lien costs and fees in municipal claims.

   (a) Matter was argued in lower court in 1971.

   (b) Matter was tried in the Court of Common Pleas of Northampton County, Pennsylvania, before President Judge Alfred T. Williams, Jr.

   (c) Opposing counsel was Thomas P. Stitt, Esquire, of 408 Meridian Bank Building, Box 483, Easton, PA, 18042, telephone (215) 258-3150. Robert J. Woodside was co-counsel. Mr. Woodside is now Judge of the Bankruptcy Court, Federal Building, P.O. Box 908, Harrisburg, PA, 17108, telephone (717) 782-2260.

5. Palmer Township Fire Company v. Palmer Township, (1973) 41 North. Cty. Reptr. (Pa.) 231, cited with approval and quoted 27 Pa. Commw. 54, 365 A.2d 880 - represented Palmer Township in case which established right of municipal officials to control and regulate fire fighting. No appeal was taken.

   (a) Matter was tried non-jury for two days in 1973.

   (b) Matter was tried in the Court of Common Pleas of Northampton County, Pennsylvania, before the late President Judge Clinton Budd Palmer.

   (c) Opposing counsel was Elwood M. Malos, Esquire, of 500 Meridian Bank Building, Easton, PA, 18042, telephone (215) 253-4251.

6. Kardelis, et. al: v. Cangelosi, (1971) 54 D.&C.2d (Pa.) 622, 40 North. Cty. Reptr. (Pa.) 176 - represented plaintiffs Kardelis, et. al. in equity case which further expanded and applied Restatement of Contracts, $90, Promissory Estoppel and Equity Jurisdiction. No appeal was taken.

   (a) Matter was tried for two days in 1971.

(b) Matter was tried in the Court of Common Pleas of Northampton County, Pennsylvania, before Judge Michael V. Franciosa.

(c) Opposing counsel was Frank Poswistilo, Esquire, of 1101 Building, Easton, PA, 18042, telephone (215) 258-2374.

7. Adams v. Hunter, (1973) 41 North. Cty. Reptr. (Pa.) 185 - represented plaintiffs Adams in equity case involving partition and adverse possession, case of first impression, actual notice rather than constructive notice rule adopted following rule in Alabama, Mississippi and Kansas. No appeal was taken.

(a) Matter was tried non-jury for two days in 1973.

(b) Matter was tried in the Court of Common Pleas of Northampton County, Pennsylvania, before the late President Judge Clinton Budd Palmer.

(c) Opposing counsel was Lawrence J. Briody, Esquire, of 429 East Broad Street, Box 1445, Bethlehem, PA, 18018, telephone (215) 865-6466

8. Stephen Allen Passarelli v. Commonwealth of Pennsylvania, (1978) No. 3925 Superior Court Allocatur Docket - represented criminal defendant and successfully obtained suppression of all evidence. Reversed on appeal. (Decision not reported).

(a) Matter was tried and argued for two days in 1978.

(b) Matter was tried in the Court of Common Pleas of Northampton County, Pennsylvania, before President Judge Alfred T. Williams, Jr.

(c) Co-counsel was Gus Milides, Esquire, of 654 Wolf Avenue, Easton, PA, 18042, telephone (215) 258-0433.

9. Green v. Green, (1974) 228 Pa. Super. 905, 322 A.2d 689 - matter was tried at trial stage and on appeal to the Superior Court of Pennsylvania which affirmed per curiam the denial of a divorce when the plaintiff was not innocent and injured. Further expanded grounds for denial of a divorce.

(a) Matter was tried for three days in 1973.

(b) Matter was tried in the Court of Common Pleas of Northampton County, Pennsylvania, before the late President Judge Clinton Budd Palmer.

(c) Opposing counsel was Richard J. Shiroff, Esquire, of 724 Lehigh Street, Easton, PA, 18042, telephone (215) 253-1023, and Gus Milides, Esquire, of 654 Wolf Avenue, Easton, PA, 18042, telephone (215) 258-0433.

10. Instead of listing another litigated matter, the following legislation which was authored by me and enacted is listed:

(a) Act of 1974, Dec. 30, P.L. 1035, No. 337, 35 P.S. §6001, amending Pennsylvania Solid Waste Act at length - Act of 1978, October 4th, P.L. ___, No. 205, 53 P.S. §66501.1, allowing extensions of sewer systems.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As a judge, I helped to re-write Pennsylvania's new Domestic Relations Law so that it would conform to federal requirements. The new act may be found in 23 Pa. C.S. Chapter 43. As a municipal solicitor, I oversaw the massive legal problems inherent in acquiring title to seven miles of railroad and converting it into a recreational bikeway. I also re-wrote a major portion of the municipal ordinances of Palmer Township. As a lawyer, I have settled numerous cases prior to trial, and I believe my ability to settle matters has assisted me as a judge. In 1983, I was asked by Pennsylvania Supreme Court Chief Justice Roberts to become Acting President Judge of Bradford County to straighten out a backlog which had developed. I completed this assignment successfully.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   Since I have served as a Judge of the Northampton County Court of Common Pleas for eight years, other than avoiding matters involving that unit of the state government, my bank and the two Authorities with which I hold a small amount of municipal bonds, I do not know of any financial arrangements or categories of litigation likely to present potential conflicts of interest. It is my policy not to serve in any matter in which I might have a conflict of interest, and to always apprise counsel if I have even a remote connection with a matter in my court.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

INCOME FOR YEAR 1987 (As of July 1)

ITEM	AMOUNT
Judge's Salary* Commonwealth of Pennsylvania	$32,500.00
Taxable Interest Merchants Bank, Easton, PA	$ 182.30
Tax Free Bond Interest Philadelphia Graduate Hospital PA Housing Finance Agency	$ 920.00
Gifts From Parents	$ 3,000.00
TOTAL	$36,602.30

*In addition to the judicial salary, there is a state retirement fund currently valued at $25,913.00.

INCOME FOR YEAR 1986

ITEM	AMOUNT
Judge's Salary* Commonwealth of Pennsylvania	$65,000.00
Taxable Interest Merchants Bank, Easton, PA	$ 462.12
Tax Free Bond Interest Philadelphia Graduate Hospital PA Housing Finance Agency	$ 920.00
Gifts From Parents	$ 6,500.00
TOTAL	$73,802.12

*In addition to the judicial salary, there is a state retirement fund currently valued at $25,913.00.

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for).

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I ran for Judge of the Court of Common Pleas of Northampton County Pennsylvania, in 1979, but withdrew when I was selected by a Merit Selection Committee and appointed by the Governor as a judge filling a vacancy by death on the same court. In 1981, I had to run again to hold my appointive seat and I ran successfully receiving the nomination of both political parties.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks 1	10,468 00	Notes payable to banks—secured	None
U.S. Government securities—add schedule 2	350 00	Notes payable to banks—unsecured	None
Listed securities—add schedule 3	25,000 00	Notes payable to relatives	None
Unlisted securities—add schedule	None	Notes payable to others	None
Accounts and notes receivable:		Accounts and bills due 6	None
Due from relatives and friends	None	Unpaid income tax	None
Due from others	None	Other unpaid tax and interest	None
Doubtful	None	Real estate mortgages payable—add schedule	None
Real estate owned—add schedule 4	200,000 00	Chattel mortgages and other liens payable	None
Real estate mortgages receivable	None	Other debts—itemize:	None
Autos and other personal property	60,000 00		
Cash value—life insurance	5,881 00		
Other assets—itemize:	—		
Judges State Retirement Fund (1987 Interest Estimated)	25,913 00		
		Total liabilities	None
		Net worth	327,612 00
Total assets	327,612 00	Total liabilities and net worth	327,612 00
CONTINGENT LIABILITIES		**GENERAL INFORMATION**	
As endorser, comaker or guarantor	None	Are any assets pledged? (Add schedule.)	No
On leases or contracts	None	Are you defendant in any suits or legal actions?	No
Legal Claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax 5	None		
Other special debt	None		

1. Merchants Bank Checking Account $ 3,943.97
   Merchants Bank Savings Account $ 6,542.47

2. Small denomination U.S. Savings Bonds face value total $ 350.00

3. Philadelphia Graduate Hospital tax free bonds $ 10,000.00
   Pennsylvania Housing Finance Agency tax free bonds $ 15,000.00

4. Only realty is jointly owned home at 15 Ridgewood Road, Easton, PA, 18042, Northampton County Deed Book 397, Page 258 $200,000.00

5. Withholding is sufficient to pay all income taxes.

6. All bills are paid as they come due.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

In 1970, I left a higher paying job as a corporate lawyer to become Chief Counsel of the Northampton County Legal Aid Society for one year. Following that, in my practice I continued to assist in legal aid work by serving without fee as a Master in divorce for legal aid cases, etc. As a judge, I have streamlined the procedures and forms of the court's Domestic Relations Section so parties can seek simple forms of relief (i.e., suspension of a support order) even if they cannot afford a lawyer.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

A complete list of all my memberships is attached hereto as Exhibit B. I am not now, nor have I ever been a member of any organization or club that invidiously discriminates on the basis of race, national origin, or religion. The same is true with regard to sex except that the Pomfret Club of Easton, Pennsylvania, used to have only male members and I was personally and directly responsible for changing this policy several years ago. Although they do not invidiously discriminate, the Elks, Moose, Lafayette Lodge, Scottish Rite, and Rajah Temple do have separate classes of membership for women, and the Goodfellows do not have any women members. If confirmed, I intend to resign from these six organizations to avoid even the remotest claim of bias.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is a Federal Judicial Nominating Commission in Pennsylvania made up of fourteen members. In 1986, I was interviewed by this merit selection commission along with numerous other lawyers and judges. Following three interviews with the commission, I was informed that my name was one of six submitted for three vacancies on the United States District Court for the Eastern District of Pennsylvania. I was then interviewed in Washington, D.C., by officials of the United States Department of Justice in June, 1987. In July, 1987, I was informed by the United States Department of Justice that I had tentative approval as one of those selected provided I passed extensive F.B.I. and A.B.A. reviews. In August, 1987, I was informed that I had passed these reviews. Following this, the President of the United States informed me of my selection.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The judicial branch of our Federal government is unique. In contrast with the legislative and executive, the members of the Federal judicial branch are not elected at any level, and under Article III, Section 1 of the United States Constitution, judges and justices hold office during good behavior. While there are many arguments in favor of this arrangement, including the need for judicial independence, there are also dangers. Most fundamental is conflict with the precept that governments which combine constitutionalism and democracy must accord primacy to the will of the majority of the people expressed in free elections. In addition, the American constitutional system of separating the government into three divisions is almost as fundamental. The recognition of three categories of state activity may be found as far back in history as Aristotles Politics, and the writings of 18th Century French Philosopher Charles Montesquieu. Nearly all modern constitutions provide for the separate establishment of legislative, executive and judicial branches.

In recent years, the realism of Justice Holmes and sociological approach to law of Dean Roscoe Pound and others has evolved into a belief by some that the Federal court system is now an appropriate arena for the play of political pressures. This approach would replace the traditional neutral judiciary

whose function was to settle disputes, administer criminal justice, and thereby interpret and apply laws, with a judiciary which makes policy as an integral part of the political system. In such a system, methods of modern social science such as an economic cost analysis can form a basis for making judicial decisions.

Such a system is no doubt quite efficient at making quick changes, but it nevertheless presents dangers. Both liberal and conservative justices of the United States Supreme Court have on numerous occasions commented on the need to maintain the traditional role of the judiciary. Without disputing the majority opinion, we note what Justice John M. Harlan wrote in his concurring and dissenting opinion in Oregon v. Mitchell, (1970) 400 U.S. 112, at page 203:

> "... the federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society. It is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people. When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect."

In A. F. of L. v. American Sash Co., (1949) 335 U.S. 538, 555, Justice Felix Frankfurter said:

> The court is not saved from being oligarchic because it professes to act in the service of human ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people, except at too slow a pace.

The United States of America is a democracy, not an oligarchy, and any tendency of the judiciary to usurp the legitimate functions of the other branches of the government must be held in check by a strictly enforced doctrine of judicial restraint. This does not mean that within the limits of the Constitution, and laws enacted by Congress, that a court cannot exercise common sense, or mercy. Nor does it mean that new situations cannot be dealt with within the framework of the traditional law. It only means that judges have the same obligation to follow the law and the Constitution as any other citizen.

AFFIDAVIT

I, FRANKLIN STUART VAN ANTWERPEN, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

4/9/87
(DATE)

Franklin Stuart Van Antwerpen
(NAME)

Doris Van Norman
(NOTARY)
MY COMMISSION EXPIRES: Dec. 17, 1990
DORIS VAN NORMAN Notary Public
Easton, Northampton Co., PA

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
910 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Carey W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
James J. Bierbower
International Square
Suite 1,275
1875 Eye Street, N.W.
Washington, DC 20006

BOARD OF GOVERNORS
LIAISON
Sharp Whitmore
2005 Gail Road
Fallbrook, CA 92028

STAFF DIRECTOR
Wantland L. Sandel, Jr.
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5685

STAFF ASSISTANT
Diane Livingston
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5701

AMERICAN BAR ASSOCIATION Standing Committee on Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

RECEIVED JUL 0 8 1987

July 6, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: JEROME TURNER
United States District Court
Western District of Tennessee

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Jerome Turner for appointment as Judge of the United States District Court for the Western District of Tennessee.

Our Committee is unanimously of the opinion that Mr. Turner is "Well Qualified" for this appointment.

Sincerely,

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members

JEROME TURNER

Birth:	February 18, 1942	Memphis, Tennessee
Legal Residence:	Tennessee	
Marital Status:	Divorced	2 children
Education:	1960 - 1963	Washington & Lee University B.A. degree
	1963 - 1966	Washington & Lee University LL.B. degree
Bar:	1966	Tennessee
Experience:	1966 - 1967	Law Clerk to Hon. Robert McRae U. S. District Court Western District of Tennessee
	1967 - 1978	Canada, Russell & Turner Associate 1967 - 1974 Partner 1974 - 1978
	1978 - present	Wildman, Harrold, Allen, Dixon & McDonnell Partner
Office:	Union Planters Bank Building 67 Madison Avenue, 12th Floor Memphis, Tennessee 38103 901 521-1111	
Home:	6900 Amberly Memphis, Tennessee 38119	

To be United States District Judge for the Western District of Tennessee

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Jerome Turner; nickname Jerry.

2. Address: List current place of residence and office address(es).

Residence Information:
6900 Amberly
Memphis, Tennessee 38119
901/756-7542.

Office:
Wildman, Harrold, Allen, Dixon & McDonnell
Union Planters Bank Building
67 Madison Avenue, 12th Floor
Memphis, Tennessee 38103
901/521-1111

3. Date and place of birth.

Born: February 18, 1942, Memphis, Tennessee.

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Divorced.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

B. A. - Washington & Lee University - Lexington, Va.
1960-63 (English Major), degree granted June 1964.

LL.B. - Washington & Lee University - Lexington,, Va.
1963-66, degree granted June 1966.

Accounting course - University of Tennessee - Memphis, Tn.
1964.

Certificate - Harvard University - Cambridge, Massachusetts.
1985 (1 week); course in Negotiations

Certificate - Harvard University - Cambridge, Massachusetts.
1986 (1 week); courses in Statutory Interpretation, Evidence and Federal Courts.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

June 1964	Worked a few days for construction company until obtained job at law office. Type of Work: Laborer.
Summers 1964, 1965, 1966	Canada, Russell & Turner, 67 Madison Ave., Memphis, Tennessee 38103 Type of Work: Law Clerk.
Nov. 1966 - Summer 1967	Honorable Robert M. McRae, U.S. District Court, 11th Floor, Clifford Davis Federal Building, Memphis, Tennessee 38103 Type of Work: Law Clerk.
Summer 1967 - July 1978	Canada, Russell & Turner, 67 Madison Avenue, Memphis, Tennessee 38103 Type of Work: Law Practice.
July 1978 - Present	Wildman, Harrold, Allen, Dixon and McDonnell, 67 Madison Avenue, Memphis, Tennessee 38103 Type of Work: Law Practice.
1975 - 1984	Raised cattle as proprietor. See Answer to Question #9 with respect to bar association and foundation service as director and officer.
1968 - 1969	Young Executives Club (defunct social organization). Former President - Mid-South Chapter, Washington & Lee Alumni Association.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of

service, rank or rate, serial number and type of discharge received.

None.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

I graduated from Washington & Lee University with an LL.B. cum laude. I was admitted to the Order of the Coif; I served as comments editor of the Washington & Lee Law Review in 1965 and 1966 and as a contributor in 1964 and 1965. I was a member of the Washington & Lee Executive Committee in 1964 through 1966 which body served as the student government organization and the honor council at Washington & Lee which has a relatively strict and all encompassing honor system.

I was inducted into Omicron Delta Kappa, listed in Who's Who In American Colleges and Universities, and received the American Jurisprudence Award for Excellence in Taxation.

Phi Delta Phi selected me as their outstanding graduate at Washington & Lee in 1966. I served as Chapter President of that legal fraternity in 1965-66 and as secretary in 1964-65. I was co-editor of the "Washington & Lee Lawyer," a legal placement publication for Washington & Lee law students. I served on the Student Bar Association Board of Governors in 1965.

I was business editor of the Washington & Lee yearbook, The Calyx, 1964.

I have served as president of the Mid-South Alumni Chapter of Washington & Lee University and am presently a current member of the alumni chapter's advisory board on its scholarship.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association
Tennessee Bar Association
Federal Bar Association

Memphis and Shelby County Bar Association
President-Elect - 1987; by virtue of this election, I am to assume the presidency in December, 1987, but will tender resignation if confirmed.
Vice-President - 1986;
Secretary - 1985;
Treasurer - 1984;
Director - 1978 and 1979;

I have served as a member of the following committees of the Memphis-Shelby County Association:

Discipline and Ethics Committee
Judiciary Practice and Procedures (Chairman 1982)
Syllabus (publication)

I am a member of my professional law school fraternity, Phi Delta Phi. I am a former member of the American Judicature Society and was listed in Who's Who in American Law, 2d ed, 1979.

I am also a director of the Memphis and Shelby County Bar Foundation having served in that capacity in 1982 and 1987.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

Memphis Public Forum (a group that sponsors debate on public issues but does not lobby)
Washington & Lee Alumni Chapter

In addition to the current memberships listed above, I have in the past belonged to the following organizations:
The Phoenix Club - Civic
Memphis Country Club - Social
Young Executive's Club - Downtown Restaurant Club
The Bachelor's Club - Social
Yuletide Revelers - Social
National Rifle Association - Lobby
Various college organizations

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

I was licensed to practice law in Tennessee on August 6, 1966, shortly after which I was admitted to practice before all the courts in Memphis and Shelby County, Tennessee, including the Circuit Court of Tennessee for the Thirtieth Judicial District, the Chancery Court of Shelby County, Tennessee, the General Sessions Court of Shelby County, Tennessee, the Criminal Court of Tennessee for the Thirtieth Judicial District, the Juvenile Court of Shelby County, the Tennessee Court of Appeals and the Tennessee Supreme Court. In addition I have been admitted to practice before a number of state courts in West Tennessee outside Shelby County.

I was admitted to practice before the United States District Court for the Western District of Tennessee in October, 1966 and thereafter admitted to practice before the United States Sixth Circuit Court of Appeals in April, 1967.I have been admitted to practice before the Supreme Court of the United States of America since March 6, 1972.

I am also admitted to practice before the United States District Court for the Eastern District of Arkansas having been admitted on August 6, 1982.

I am admitted to practice in the United States District Court for the Northern District of Mississippi, having been admitted to practice before that court on January 13, 1986. I am admitted to practice before the United States Fifth Circuit Court of Appeals, having been admitted in July, 1984. I have also appeared on individual cases before several other United States District Courts, specifically the District Court in Kansas, the District Court sitting in Minneapolis, Minnesota and the District Court in Northern Texas, Dallas, as well as state courts in Arkansas.

12. Published Writings: List all titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If

there were press reports about the speech, and they are readily available to you, please supply them.

While in law school, I authored two law review comments in the "Washington & Lee Law Review":

Recovery for Injury Causing Death of Unborn Child, 22-1 Washington & Lee L. Rev. 146 (1965);

Tax Depreciation Deductions in Year of Sale, 22-2 Washington & Lee L. Rev. 262 (1966).

13. Health: What is the present state of your health? List the date of your last physical examination.

Good - July, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held judicial office.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have not held public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

/

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

After graduating from law school, I was employed by United States District Court Judge Robert M. McRae, Western District of Tennessee, as his law clerk upon his appointment to that position in November, 1966. I served with Judge McRae until the summer of 1977 when I returned to the law firm of Canada, Russell & Turner where I had previously worked as a summer law clerk and a post-law school graduate clerk prior to my appointment as a law clerk for the United States District Judge.

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

I practiced at Canada, Russell & Turner (after three summer clerkships there) from 1967, first as an associate and then beginning on January 1, 1974 as a partner until July, 1978 when the firm was dissolved because of the desire of all but three of my then current partners to form a new law firm by merger with the firm of Wildman, Harrold, Allen & Dixon in Chicago, Illinois. We completed that merger and have practiced since that time under the name of Wildman, Harrold, Allen, Dixon & McDonnell in Memphis. I have been a partner in Wildman, Harrold, Allen, Dixon & McDonnell since its origination in 1978.

My law firm has offices in Memphis, Chicago, Atlanta, Los Angeles, Houston and New York. We also have a small office in London which has usually been manned by one or two American lawyers.

My address both at Canada, Russell & Turner and at Wildman, Harrold, Allen, Dixon &

McDonnell has been the same during the entire twenty years, that is, 12th Floor, Union Planters Bank Building, 67 Madison Avenue, Memphis, Tennessee 38103.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

When I initially began practicing law, my practice was very general including all types of civil practice, commercial, litigation, probate and estate, etc. I practiced some criminal law during the early years of my practice. Since those seven to nine initial years, my practice has centered more and more on civil litigation and at this time is practically 100% civil litigation.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

The typical client that I now represent is a business concern which has become involved either as plaintiff or defendant in litigation. The size of such clients has varied from small individual proprietorships to large corporate concerns. In recent years I have involved myself in more personal injury cases as plaintiff's attorney because the trial work is enjoyable and constitutes a variation in my more typical representation of commercial litigants. It also gets me in the court room more often.

For a number of years prior to 1983 I handled a substantial amount of insurance defense work which frequently involved personal injury and property damage claims concerning products liability and/or negligence.

My firm is general counsel for a large bank and over the years I have handled legal work and litigation for its trust department which has involved the construction of wills and trusts as well as the defense of claims made relative to the handling of estates and trusts by that department. I have also

handled a number of bank loan suits and default workouts.

I do not truly specialize in any area of the law although my practice has been limited more and more over the years to general civil litigation.

I have thus represented individuals, banks, trust departments, insurance companies, commodity brokerage houses, manufacturing concerns, railroads, farm equipment manufacturers, herbicide manufacturers, punch press manufacturers, medical partners, and commercial real estate owners, both with regard to personal injuries and commercial disputes.

c. 1. Did you appear in court frequently, occasionally, or not al all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appear in court regularly, although the nature of the type litigation I handle does not require me to appear on a daily or even weekly basis. I have always appeared in court on a regular basis.

My experience prior to 1982 probably involved more frequent appearances in court than today although I also handled more non-litigation matters in those days. Prior to 1977 during the first ten years of my practice, being a younger and less experienced lawyer, I then handled many more hearings on motions and other pre-trial matters which my senior partners assigned to me.

2. What percentage of these appearances was in:
(a) federal courts;
(b) state courts of record;
(c) other courts.

Although I have no exact numbers, I suspect that a slight majority of my cases are in the federal courts. The balance of my practice is in state courts of record.

3. What percentage of your litigation was:
(a) civil;
(b) criminal.

At this point in my legal career my litigation is 100% civil. Earlier I handled some criminal work as well as civil litigation.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

After spending a little time trying to recall the cases I have handled to verdict or a judgment following trial, I can remember approximately 23 cases that were tried in courts of record to conclusion. This does not include many more cases disposed of on pre-trial motions to dismiss or for summary judgment.

Of those 23, approximately 18 were handled by me as sole trial counsel, although associates may have been used on pre-trial matters. Approximately four involved me as chief counsel and one was tried by me as associate counsel.

5. What percentage of these trials was:
(a) jury;
(b) non-jury.

Fifty-six percent of those cases were tried before a judge; the rest (forty-four percent) were tried before a jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Most cases that I have handled during the 21 years I have practiced, like most cases filed, have significance primarily to the parties and their lawyers. A few, of course, impact well beyond their direct effect on the people actually involved in the case, some slightly and even fewer, to a greater degree.

1. In Dattel v. Dattel, case number 14093-3 R.D. in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, originally a divorce case, I took over the representation of three of the four children of the divorcing parties approximately eighteen years after the divorce case had been tried. As a part of the divorce settlement, Sam Dattel created a trust in which he placed his one/half interest in a large number of apartment complexes. The trust was created by consent to satisfy an alimony decree and provided for the payment of net income to Mr. Dattel's former wife during her lifetime. Their four children are the remaindermen of that trust and take the principal upon the death of their mother.

Several years after the trust had been established the life beneficiary (former wife) sued to require the trustee to reimburse the income of the trust out of the principal for amortization payments made on mortgages that had encumbered the various apartment complexes at the establishment of the trust. Approximately $560,000 worth of amortization payments either had been paid or would be paid in the future and at the time the exceptions to the trustees' accounting were filed, the full amortization payments were being made out of income. Before my participation in the case, the trial judge, after a number of years, decreed that the trustees should reimburse income out of principal to the extent of all payments made to amortize the mortgages and no ruling was made on the question of whether or not a depreciation reserve fund should be created by the trustees as argued by the remaindermen. Approximately one year after the court's ruling, I was retained in 1985 to represent three of the four remaindermen and was successful in obtaining

a reversal of the trial court's ruling in the Court of Appeals of Tennessee. The case involved new issues for the Tennessee courts and, in addition to a reversal of the trial court's order requiring the trustee to reimburse income out of principal, we were successful in obtaining an order requiring the creation of a depreciation reserve fund out of income.

The life income beneficiary sought permission of the Supreme Court of Tennessee to appeal further; the Court has refused to hear the amortization issue, thus terminating the major issue in the case in favor of my clients; the depreciation reserve issue is still pending before the Supreme Court of Tennessee and will be heard in November, 1987.

The significance of this case is that it has established a rule of law in Tennessee under certain circumstances relative to the allocation of mortgage amortization payments between the income beneficiary and the remaindermen of a trust; it has also, subject to the pending appeal, in a question of first impression established the trustee's obligation to provide against physical depreciation of corpus by reserving a fund out of current income.

The Court of Appeals decided the case during August, 1986; the three judges who sat on the Court of Appeals panel are Judges Highers, Tomlin and McLemore. John Wilkinson, Jr., 100 North Main Building, Suite 1336, Memphis, Tennessee 38013 901/525-2701 represented the life beneficiary as opposing counsel; Michael Hewgley, 1755 Kirby Parkway, Memphis, Tennessee 38119 901/756-3000 represented one of the co-defendants, the settlor of the trust.

2. Interfirst Bank of Dallas, N.A. v. Federal Deposit Insurance Corporation, Hibernia National Bank of New Orleans and Stephen A. Jernigan, No. 84-1570, United States Court of Appeals for the Fifth Circuit.

This case began as an interpleader by Interfirst Bank of Dallas, N.A. who was holding deposits for its customer, Stephen A. Jernigan. These deposits constituted $3,000,000.00 in certificates of deposit which had been pledged by Mr. Jernigan

against a loan he had made at Penn Square Bank. Hibernia National Bank of New Orleans, my client, had purchased a very high percentage (98.4355%) of the loan from Penn Square Bank and was attempting, after the appointment of a receiver for Penn Square, to secure payment of that loan by application of the collateral certificates of deposit. Federal Deposit Insurance Corporation was involved as receiver for Penn Square Bank.

Mr. Jernigan asserted in the interpleader suit in a cross-claim against Hibernia National Bank that Hibernia had tortiously interfered with his contractual rights involved in the deposits and his obligation to repay FDIC as receiver for Penn Square and he sued for several million dollars.

While the case was pending, the U. S. Tenth Circuit in a case involving Hibernia and the FDIC. held that Hibernia had no direct rights (as a loan participant) in the collateral on the participated loans and thus established that Hibernia itself had not had the right to apply the Jernigan collateral directly against the loan as it had attempted to do so.

I took over the case in 1983 shortly before it was set for trial and moved for summary judgment against Jernigan after all discovery was completed. The trial court granted Hibernia's motion for summary judgment which was appealed to the United States Court of Appeals for the Fifth Circuit. After oral argument, the Fifth Circuit Court of Appeals affirmed Hibernia's summary judgment by summary order issued the day of our oral argument in New Orleans, February 5, 1985.

The significance of this case was the establishment in the Fifth Circuit of new Texas case law that, even though a party is unsuccessful in pursuing earlier litigation claims, he does not subject himself to liability for tortious interference of the winning parties' contract rights as long as a colorable legal right existed to support the initial claim.

Stephen D. Powell of Kirk and Chaney, 1300 Midland Center, 134 Robert S. Kerr Avenue, Oklahoma City, Oklahoma 73102 (405/235-1333) represented Mr. Jernigan and Duncan Cloar, 1201 Main Place, P. O. Box 50100, Dallas, Texas 75250 (214/658-1600)

represented the Federal Deposit Insurance Corporation. Richard Adams, Suite 2500, 2001 Bryton Tower, Dallas, Texas 75201 (214/748-9365) acted as local co-counsel and Robert M. Johnson, my partner, wrote the basic brief in the Fifth Circuit. The trial judge was the Honorable Barefoot Sanders of the United States District Court for the Northern District of Texas in Dallas. The Fifth Circuit decision is reported at 755 F.2d 171 without published opinion.

3. In Aderhold v. Forrest City Machine Works, I represented Forrest City Machine Works, having been retained by Aetna Casualty and Surety Company. A young child by the name of Aderhold had been caught in the moving PTO shaft of a grain cart that had been manufactured by Forrest City Machine Works many years before the accident. The case was a products liability claim based on strict liability and was extremely serious in light of the injuries that had been suffered by the young plaintiff.

The plaintiff's case was tried by David Blair who resides in Batesville, Arkansas, (501/793-8350) in association with Ross B. Clark, II, 1709 Kirby Parkway, Memphis, Tennessee 38187, 901/756-1550 over the length of an entire week before a jury who found that Forrest City Machine Works had manufactured an unreasonably dangerous grain cart (it contained no guard on the PTO shaft) and awarded $385,000 compensatory damages and $500,000 punitive damages. The case was tried before Judge John L. Anderson in Wynne, Arkansas in 1979. On appeal, the Supreme Court of Arkansas reversed the award of punitive damages but affirmed the award of compensatory damages to young Aderhold.

Tom Smith of Wynne, Arkansas (501/238-9780) associated with me on the trial of this case as did the general counsel for Forrest City Machine Works, Frank Morledge, who resides and practices in Forrest City, Arkansas (501/633-9531).

I took over the handling of the case prior to any discovery and did all the work except for the preparation of the brief on appeal to the Supreme Court of Arkansas which was prepared by my partner, Tom Walsh.

The significance of this case is two-fold; it was the last Arkansas case in a long line that severely limited the award of punitive damages and at the same time it more firmly established the manufacturer's strict liability despite intervening but foreseeable acts by others. It also applied a 1973 statute of strict liability to a 1956 act of manufacture. The appellate court opinion is reported at 616 S.W.2d 720.

4. In Irving Pulp & Paper Company v. Belz Investment Company, et. al., I represented the owner of a wood frame warehouse that collapsed during a rain storm. The plaintiff, Irving Pulp & Paper Company, owned several hundred thousand dollars of wood pulp that had been stored in the warehouse which was being operated as a bonded warehouse by my client's lessee who was also a defendant in the case. After extensive discovery in 1978 through 1980 that took place in Texas, Missouri, Tennessee and Canada, the case was tried for approximately one week before Judge Harry Wellford then sitting as United States District Court Judge for the Western District of Tennessee. Judge Wellford is now a judge on the Sixth Circuit of Appeals with an office in Memphis. Shortly before trial, defendants convinced the plaintiff to waive its prayer for a jury and the case was tried before Judge Wellford and thoroughly briefed by all parties after the trial. In the end, Judge Wellford's lengthy memorandum opinion exonerated my client, Belz Investment Company, of all fault but awarded judgment against the lessee. During post-judgment negotiations, I feel I was able to convince the plaintiff's attorneys not to appeal with respect to Belz Investment Company because of the work that had been done by me during the trial and in post-trial briefing. On cross-appeal between the plaintiff and lessee, Judge Wellford's judgment against the lessee was reversed with respect to amount of damages and remanded for an additional hearing on damages. After the additional hearing, a judgment in excess of $200,000 was awarded against the lessee.

This case involved significant questions concerning the liability of a lessor when the entire premises are leased to and under the control of a lessee even though the premises

(building) were not designed, nor built by the lessee.

The case was tried before Judge Wellford in 1980 as I recall and decided by him approximately one year later.

The appellate opinion is reported at 732 F.2d 511(6th Cir.1984).

Several counsel were involved:

John Smith, Plaintiff's attorney
81 Monroe Avenue
Memphis, Tennessee 38103
901/525-6781

Allan Thorpe, Plaintiff's attorney
770 Estate Place
Memphis, Tennessee 38119
901/767-8870

Minor Tait, Co-defendant's counsel
Dale Tuttle
81 Monroe Avenue
Memphis, Tennessee 38103
901/526-0606

Gary Smith, Co-defendant's counsel
8 North Third, Suite 300
Memphis, Tennessee 38103
901/526-7399

5. In Hibernia National Bank, N.A. v. Malone, Case Number 83-434 in the United States District Court for Kansas, I represented Hibernia National Bank who was suing an attorney that it had retained in connection with a very sizable energy loan in Kansas to be secured by oil leases located in Kansas. I took over the case for trial in 1984 after one of my partners filed the complaint. The contention on behalf of Hibernia National Bank was that the attorney had been negligent in his one day examination of titles to the numerous oil leases which examination had failed to disclose the existence of sizable lien claims on the oil leases. The defendant contended that he was asked only to spotcheck the titles because of time limitations. I was in the unusual position, based on my historical practice, of representing a plaintiff in a malpractice case. The case was

tried before U. S. Judge Patrick Kelley in December, 1984, in Wichita, Kansas for approximately one week. I was informed by the jury that they had initially voted five to two in favor of the plaintiff but that over the remainder of their deliberations, the jury reversed itself and came back with an award for the defendant. Opposing counsel in this case was Richard C. Hite, Suite 630, 200 W. Douglas St., Wichitau, KS., 316-265-7761.

The primary significance of this case was to the parties. It was significant to me personally because I had done very little plaintiff's work (except on commercial instruments and contracts) and I found that I enjoyed the work.

6. In Jamison v. Shell Company, et. al., I represented Shell Oil Company who had been sued by the Jamisons in connection with alleged damage to their cotton as a result of the use of a herbicide manufactured by a division of Shell Oil Company. A significant amount of cotton had died following the application of the herbicide. The case was extensively prepared by all counsel and was tried before a jury in the Eastern Division of the Western District of Tennessee, U. S. District Court Judge Harry Wellford presiding. After a full two week trial, the jury returned a verdict in excess of $120,000 for the plaintiff. Interestingly and significantly, the jury's verdict which was on special verdict form made a finding that the plaintiff, although not guilty of proximate contributory negligence, had been guilty of remote contributory negligence which under Tennessee law reduces damages. However, a contributory negligence defense generally is inapplicable to strict liability in Tennessee and, although the defendant was held on the jury's verdict to be guilty of negligence, it was also held to be strictly liable for the damage claimed.

On post-trial motions, we were able to convince Judge Wellford that if the Tennessee Supreme Court were faced with the question, it would permit the reduction of damages by an appropriate percentage based on the finding of remote contributory negligence even in the case of strict liability. We were also able to convince Judge Wellford that certain insurance payments which had been provided by the government to the plaintiff in connection

with the losses suffered to his cotton that year should partially offset the amount of the judgment. As a result of these post-trial motions, the judgment for the plaintiff was reduced by the trial court to approximately one-half and thereafter, the case was settled.

Hulon Warlick, 47 North Third, Memphis, Tennessee, 38103 901/525-6665, acted as counsel for the plaintiff, along with David Lillard, who was associated with Mr. Warlick at that time. Mr. Lillard's address is 80 Monroe, 7th Floor, Memphis, Tennessee 38103 901/526-7000. In the trial of the case, the co-defendant distributor was represented by William Jeter, Esq., 26 North Second, Memphis, Tennessee 38103 901/527-4673. The case was tried in early 1981 I believe.

The significance of this case was two-fold: first, the judge used a finding of remote contributory negligence (law unique to Tennessee) to reduce the strict liability verdict; secondly, the court reduced the award in part on account of insurance payments received by the plaintiffs after being convinced that the collateral source rule should not apply.

7. The first jury case I ever prepared and tried by myself was the case of _____ v. Missouri Pacific Railroad where the plaintiff was represented by Sam Cole, Sr., who is now deceased. Because the plaintiff had suffered the loss of a hand as a result of having been run over by a train, the case appeared extremely serious and one that would be difficult to win for the defendant. However, because of extensive discovery of the plaintiff and the three persons who were with him at the time he was injured late at night in a railroad yard, I was able to prove that there was substantial question about whether the plaintiff had actually been injured on my client's tracks or by my client's train or by an adjoining railroad company. The jury returned a verdict in favor of the defendant. The case was tried by Judge Irving Strauch, who is now retired but lives in Memphis at 75 Rose Road, S., 901/682-3132. I do not remember when I tried the case but it was probably in the late 1960's or early 1970's. After dictating this summary, I found that my file which had been closed for years had been routinely

destroyed and I cannot locate either the plaintiff's name or case number.

8. In 1978, I was asked to represent a defendant in a wrongful death case under the style of Williams v. Bonner. I represented an individual defendant in the Circuit Court of Tennessee which was sitting in Somerville, Tennessee at that time, the judge being Herman Revere, who is now retired. I do not know his current address. The plaintiff was represented by John Wilder who is and has been for many years the Speaker of the Senate of the State of Tennessee and widely known in West Tennessee, but particularly well known and respected in Somerville, Tennessee where his offices are located (901/465-3616). The case was based on the family purpose doctrine and involved the death of a young boy who was riding in a car owned by my client, but driven without permission by a relative. Although summary judgment had been unsuccessfully sought both in the trial court and in the Court of Appeals by one of my partners before I took over the case, I was successful in obtaining a directed verdict against the plaintiff and in favor of my client midway through the defendant's proof. The personal significance of the case was that I beat John Wilder in his home territory. The case was also significant to me because Judge Revere handled this case in such a fashion that, even if it had gone to the jury we would have completed the case in one day. It taught me how quickly a judge can move a case if he goes forward with that goal.

9. In Feld Leasing Company v._____, I, along with co-counsel from Kansas City, Kansas, represented the plaintiff who was seeking to obtain an injunction against a former employee who was then competing against the plaintiff in violation of his employment contract non-competition provisions. This was one of the earliest trials that I tried without significant assistance from senior attorneys. The case was tried before the Honorable Wil V. Doran, Chancellor, who is now practicing with the Tennessee Attorney General's office in Memphis, Tennessee. Chancellor Doran may be contacted at 201 Poplar Avenue, Suite 301, Memphis, Tennessee 38103, 901/576-5900. The personal significance of this case of course was that it was tried by me without significant assistance from my senior

partners and we were successful in obtaining an injunction under extremely difficult factual circumstances. Again after dictating this summary, I found that my office file has been routinely destroyed.

10. In Fredette Smith Eagle, et al. v. National Bank of Commerce, et al., Number 79903 R.D. in the Chancery Court of Shelby County, Tennessee, before Honorable Wil Doran, my partner, James McDonnell, and I represented the plaintiffs who were beneficiaries of a trust of which the National Bank of Commerce served as trustee. It was the undisputed contention of the plaintiff that millions of dollars of trust funds had been used by the trustee for the purpose of funding the establishment of Federal Express Corporation which was founded by one of the other beneficiaries of the trust. It was the contention of the plaintiffs that these investments constituted a breach of trust to their significant detriment inasmuch as the trust had been depleted by approximately 80% of its aggregate corpus and had suffered a 66% reduction in its annual income. The trust had one asset, stock in Frederick Smith Enterprise, Inc., a personal holding company. Between 1971 and 1975, the holding company, because of investments in Federal Express Corporation, suffered losses in net asset value from approximately $16,500,000 to a little more than $2,000,000. Dividends dropped from over $300,000 to less than $100,000 and the testamentary trust, which was totally dependent upon the holding company dividends for income, reduced distributions to the income beneficiaries by approximately 66%.

The case generated emotional responses on the part of a lot of people who were not directly involved in the litigation because it involved charges of a significant nature against one of the three largest banks at that time in the Memphis community. It was speculated that if a judgment were rendered against the bank for the full amount of the losses that existed at the time of the filing of the lawsuit, the bank's actual existence could have been in jeopardy. Moreover, Federal Express Corporation was at that time still a brand new venture capital company and the problems generated by this kind of litigation, although not directly involving Federal Express Corporation as

a party, were significant and created adverse circumstances for the company in their financing efforts.

After significant discovery, defendants moved for a summary judgment which was opposed by Mr. McDonnell and me successfully. Further discovery and the passage of time, however, led to a settlement among all parties which was approved by the Chancery Court of Shelby County, Tennessee which basically put the trusts back into the same shape that they had been in prior to the investment of trust assets in Federal Express Corporation.

I was second attorney to my partner James W. McDonnell on this litigation but did a lot of work in discovery, opposing the summary judgment and in connection with the settlement.

Frank Glankler, Jr., One Commerce Square, Suite 1700, Memphis, Tennessee 38103 901/525-1322 represented the National Bank of Commerce and other individual defendants as our opposing counsel. Robert Green, 65 Union Avenue, 9th Floor, Memphis, Tennessee 38103 901/523-2500 was named guardian ad litem in the case by the Honorable Wil Doran and will have significant knowledge about the case itself. Tom Cates and Lucius Burch, as I recall, represented Frederick Smith. Their address is 130 North Court Avenue, Memphis, Tennessee 38103 901/523-2311.

Molloy, Simpson & Johnson, who at that time had offices at Suite 309, 1900 L Street N.W., Washington, D.C. 20036 (703/281-2323) were our co-counsel.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

The most significant legal activity pursued by me, which did not progress to trial, is a case I am currently involved in as attorney for the Pension Plan of Richards Medical Company

wherein my clients seek to recover the control of and approximately $15,000,000.00 in pension assets from a former parent of Richards Medical Company.

During the years that Richards Medical Company was owned by that former parent, Richards adopted for its own pension plan most of the terms of its parent company's pension plan and delegated administration in large part to its parent based on the economy of administrative consolidation. However, when the parent sold the stock of Richards Medical Company, it refused to relinquish control of the Richards' pension plan and its assets, claiming that as a parent company it had the right to assume control over the plan.

On motion for summary judgment I and my co-counsel have succeeded in obtaining a declaratory judgment and injunction in the United States District Court that the control of the plan and its assets rightfully belongs to Richards. The matter, of course, will be appealed.

I have participated in this case as lead Tennessee counsel, where the case is pending, and have with all co-counsel worked on the entire case, including most particularly strategical planning. My co-counsel have been Mark Vorder Bruegge, a partner in my office, and Henry Rose of Epstein, Becker, Borsody & Green, P.C., Washington, D.C. (202/861-1874) pension counsel. Opposing counsel are Robert M. Goldich, of Philadelphia, PA and Fraser Humphreys, Jr., 2200 1st Tennessee Bank Building, Memphis, Tennessee, (901/523-8088).

I have also recently negotiated, without litigation, a long-term workout of a 1.8 million dollar indebtedness owed to a savings and loan institution by a corporation whose stock was purchased by corporate management and a new investor as a part of the workout proposal. Because of unusual circumstances surrounding the creation of the indebtedness, multiple parties with varying interests and the size of the debt, most of the time during negotiations, it appeared that multiple litigation and bankruptcy of the debtor was the most probable outcome which might have caused significant long term damage not only to the debtor, but to my client and many, if not all of the involved individuals. My participation in this matter was as lead counsel and negotiator for the creditor, Fidelity Federal Savings & Loan Bank of Corinth, Mississippi. Counsel for the debtor is Price Coleman of Jackson, Mississippi (601/969-7607).

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

I presently own a 4.264 percent interest in my partnership, Wildman, Harrold, Allen, Dixon and McDonnell, relative to the capital and income accounts of the Memphis office. If my nomination is confirmed, my participation in this partnership will be severed and terminated prior to my being sworn in based on a mutually agreed termination plan which may include deferred payments for up to but no longer than three years.

All of my financial arrangements with clients have been made on behalf of the law firm and will not involve me further upon termination of my participation in the partnership.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

Potential conflicts of interest will be considered by me personally in the first instance. If I feel that a conflict is involved or that my impartiality might reasonably be questioned, I will recuse myself from the case.

If the conflict is not in my opinion a true conflict or one where my impartiality might reasonably be questioned, but one that vaguely appears to be a possible conflict, I will announce it on the record to the attorneys for the parties involved and seek a determination as to whether any of the parties feel recusal is necessary or appropriate in which case I would consider withdrawal from the case.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the

particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes. In 1981 and 1982 I served as Treasurer of the Honorable Don Sundquist's first congressional election campaign. The committee was named: Elect Don Sundquist to Congress. After Congressman Sundquist won, I continued as his election campaign treasurer for the Re-Elect Don Sundquist Committee and served during the 1984 and 1986 campaigns. I resigned shortly after the 1986 election was completed.

As treasurer I had the responsibility to file the necessary financial disclosure reports required by federal election laws and regulations. I also maintained custody and control of campaign funds and records, signed contracts, paid bills, filed tax returns, made certain the committees complied with applicable laws and regulations and consulted with Federal Election Committee staff personnel when appropriate. I oversaw the maintenance of manual and computer campaign finance records and supervised employees in that regard.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

Although no plan of termination has been worked out, it is possible that the ultimate agreement with my law firm will provide for severance benefits to be paid out for up to three years in the event my relationship with the firm is terminated. If my nomination is confirmed, the termination agreement will be finalized before I am sworn in. I envision that all compensation for my work on pending litigation will be paid directly to the law firm; whether I will participate directly in those payments is not yet determined but I consider it unlikely.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.).

The financial statement and appropriate schedules are attached.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	9,945	Notes payable to banks—secured	19,438
U.S. Government securities—add schedule	- 0 -	Notes payable to banks—unsecured	17,067
Listed securities—add schedule	- 0 -	Notes payable to relatives	- 0 -
Unlisted securities—add schedule	7,362	Notes payable to others	- 0 -
Accounts and notes receivable:		Accounts and bills due	- 0 -
Due from relatives and friends	- 0 -	Unpaid income tax	- 0 -
Due from others	2,210	Other unpaid tax and interest	- 0 -
Doubtful	- 0 -	Real estate mortgages payable—add schedule	- 0 -
Real estate owned—add schedule	10,000	Chattel mortgages and other liens payable	- 0 -
Real estate mortgages receivable	- 0 -	Other debts—Itemize:	- 0 -
Autos and other personal property (est	50,000	*Contract to purchase home	340,000
Cash value—life insurance (net)	14,200	(See Schedule)	
Other assets—Itemize: Other (See schedule)	186,868	Contingent Liability-See Sch.	
Contract to purchase home	345,000		
E.F. Hutton Investment Acct.	3,184		
Union Plumbers - HR 10	55,005	Total liabilities	376,505
Fidelity Cash Res. - HR 10	59,330	Net worth	376,599
Total assets	753,104	Total liabilities and net worth	753,104
CONTINGENT LIABILITIES		**GENERAL INFORMATION**	
As endorser, comaker or guarantor	See Schedule	Are any assets pledged? (Add schedule.)	Yes
On leases or contracts	See Schedule	Are you defendant in any suits or legal actions?	No.
Legal Claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	None		
Other special debt	None		

This statement made as of July 6, 1987, but certain accounts may reflect earlier but most recent statement values.

SCHEDULE TO FINANCIAL STATEMENT DATED JULY 6, 1987

Unlisted Securities

3 shares Union Planters National Bank	$ 112.00
Stock in Federal Land Bank of Louisville (est.)	7,250.00

Real Estate

Undivided 1/6 interest in 1637 Eastmoreland in Memphis, Tennessee. Estimated value of total property - $60,000.00	10,000.00

Other Assets

E. F. Hutton - IRA	24,021.00
Partnership - Undrawn Profits	12,847.00
Partnership - Capital account (estimated)	150,000.00
Total value of "other assets " listed on this schedule	186,868.00

Contingent Liabilities

I am liable on an approximate $113,000 Federal Land Bank mortgage on a former residence; the mortgage secured by first lien on property appraised at $584,000 and I am indemnified against any expense on this mortgage by the present owner.

As a law partner, I am secondarily liable to the extent of $20,000 on law firm long-term indebtedness.

As a law partner I am secondarily liable on my law firm's lease of its offices.

Pledged Assets

1987 automobile is pledged on bank loan.

Real Estate Contract

My fiancee and I have contracted to purchase a home. Full liability and asset values are reflected herein.

Contingent Assets

I have a 1/15 remainder interest in a trust created by my grandfather. The current value of my remainder interest as of 03/21/87 was approximately $15,000.00.

Children

I hold stock and bank accounts in my name as custodian for my children. These assets are worth in total $1,115.89.

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activisim."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

RESPONSE

Although the federal juriciary in the last 25 years has clearly enunciated the constituional rights of United States citizens to certain theretofore unsecured legal benefits, I do not believe that the courts have generally usurped prerogatives of other branches of government in any wrongful sense of the term.

I do, however, accept wholeheartedly the concept of judicial restraint -- that is, the recognition that a judge's job is to resolve legal disputes when presented within that court's jurisdiction and, when an illegality is found, to fashion an appropriate remedy

and thereby give efficacy to the law and underlying rights, while at the same time avoiding the temptation to inflict on the case and its progeny personal viewpoints of what the law should be.

An apparent failure of courts to recognize that their function can best be accomplished if political authority is left to the democratically selected choices of the majority has, in instances, led the courts beyond their traditional functions into the arena of magnified policies involvement.

One's personal view of what the law ought to be should not interfere with a judge's application of the law as it has been held by the Supreme Court or an authoritative Circuit. The Supreme Court and the appropriate Circuit Court of Appeals are controlling authority; where they have ruled with respect to the construction of law in a given situation, their ruling must be followed by a district court within the circuit regardless of the judge's own personal concepts of what the law ought or ought not to be. In the absence of a ruling by a controlling court, a judge's job is to apply the law, as it is construed by the court based on persuasive authority, studied analysis and fairness without regard to the court's personal views on what laws Congress ought or ought not to have enacted.

When a court refuses to adhere to this doctrine and instead adopts an attitude that permits the court's personal sympathies to control his or her construction of the law, it can indeed be said to be invading the province of the leglislature.

In a realistic view, however, the courts are not legislatures and do not legislate. Under our judicial system, the courts do not engage in ruling on hypothetical cases, but are limited to the formation of decisions which are permitted in the very limited context of individual actual cases initiated by persons outside of the court system. It is true that decisions of the courts do in many cases effectuate change and thus may appear to be creating new policy (i.e. the implementation of long-term goals). But unlike the legislature, the courts do not initiate their own cases, nor, as the legislature can and does, freely choose the subjects upon which they will rule. The courts do not ask the questions that are presented to them; they merely provide the answers to those questions.

And while it is true to a limited extent that the courts do have power to enforce or implement their orders and decrees, even here it is necessary for the judiciary to rely upon the executive to underwrite enforcement of its decrees where they are not readily acceptable to a given controlling group. However, the court's limited power of enforcement and thus implementation of any policy that may be said to have been generated by individual decisions is also limited to case-by-case rulings.

Interestingly enough, in a statement publicized from time to time, Alexander Hamilton said that the courts or judiciary are the least dangerous of the three branches of government, because it has the least capacity to injure. Undoubtedly, this statement is arguably still true today because of the limited context in which the courts are afforded an opportunity to exercise their powers.

When a dispute, whether it be fairly common or one of uniqueness, is presented within the jurisdiction of a court, which involves the issue of protecting legal rights, the court, if it determines under applicable law that a citizen has been deprived of his or her legal right, has an obligation to protect that right. Its job unquestionably includes granting relief from unlawful action once that unlawful action has been judicially determined to exist. In order to protect legal rights (whether constitutional or statutory), a remedy must be fashioned that will not only declare the wrong, but with respect to continuous course of conduct, will cause cessation of continuing violations where the traditional legal remedy of monetary damages is inappropriate as is frequently the case with respect to civil rights.

Historically legal wrongs in our system of judicial dispute resolution have generally been legally righted, after their commission, by the award of monetary damages, a system long developed under our common law.

However, the system in its origination soon recognized that there were cases where monetary damages were simply insufficient. Thus, in the case of continuing nuisances, threatened acts, damages of such a permanent nature that money cannot offer fair compensation and other specific instances, equity developed the ability to fashion relief by order of the court directed to the

person committing the wrong to, in effect, do right, or at least cease doing wrong.

This injunctive process has most frequently been applied in recent history in remedying political and civil right violations which have been held to be fundamental in their nature and thus unsusceptible to monetary compensation. Injunctions in such cases have frequently been used to secure to each of us, though the initial vehicle of an individual court case, the liberties guaranteed by our Constitution.

Under our Declaration of Independence, humans are by nature equal with reference to political and civil rights and each is affixed with those rights which cannot lawfully be denied them; these rights are as the Declaration states "inalienable." However, such rights, whether inalienable or not, must be protected and secured to the citizens if they are to have meaning. Thus, our system has accepted and demands the judicial function of protecting those rights by the declaration and enforcement of decrees that will prevent further denial of such rights.

It appears basic to this writer that if each of us is not protected in those rights, then none of us is protected. It also appears basic to this writer that protection of these rights is basically a protection against the majority view (either in general or in the form of government) and that these liberties afforded to us by our political writings are a statement of minimal acceptable conduct toward others from those who by strength of their majority control the community.

In order to secure to all of us the liberties which are made up of these civil rights, there must be a method whereby remedies may be decreed when one segment of society denies the liberties to any other citizen or class of citizen.

Moreover, since courts must, in the nature of their job, protect the rights of citizens against illegal majority action, it is not unexpected that judgments of the courts will frequently conflict with the immediate will of the majority and thus draw the majority's ire and displeasure.

Moreover, change, although absolutely necessary, is uncomfortable and therefore resisted in many cases. Individual case losers, those comfortable with the status quo, and others who fear change can be expected

to express substantial displeasure with the vigorous enforcement of constitutional and legal rights afforded to, not just the majority group of citizens, but to all citizens within the country.

At the same time, we have a system of government by law, not by people or by judges. Thus each case should be and by virtue of the system we have adopted is designed to be decided according not to the personal bias of any given judge, but according to applicable rules of law. In so applying the protection of these civil and legal rights within the system that we have adopted, it has come to be expected that our courts will enunciate the principles of law that they apply in given cases and the basis for their application for two reasons:

First, in expounding its reasons for a decision of illegality, a court, if the citizens and the government are to know what is legally acceptable, must set forth the parameters of the illegality it decrees.

Secondly, appellate courts are thus enabled to review for correctness the principles that have been applied to a given case.

Moreover, by permitting the appellate courts to review these principles and having them set forth the principles they hold govern the individual case, we have also adopted a system (stare decisis) that sets up these principles as guides for lesser courts to apply in similar cases in the future.

Thereby we once again reinforce our government of laws, rather than of men, but at the same time we impose the vehicle of one case's ruling on a broader group of our citizens than those who were immediately involved in the present litigation. Thus, if one Kansas school system is held to be denying the constitutional rights of its black citizens because it provides separate schools on the basis of race, then the enunciation of such a decision will generally, and in this specific case can be seen to have had, a much broader effect than was felt by the particular parties to that case.

Although this can compound the substantial displeasure of those who disagree with any given decision of a court, it is a system that is maintained by the outstanding political logic that what is constitutional in New Jersey is also constitutional in Arizona, but what is unconstitutional in Oregon is likewise

unconstitutional in Florida, and judicial economy dictates, as does intellectual study and reason, that prior decisions be given consideration in similar circumstances.

The design of the use of precedent, however, also realistically places a limited but definite policy making power in the courts' hands (more often in the appellate courts) because each case or controversy thereby has a life well beyond the confines of the individuals who litigated the issues initially. Not only lawyers, businesses, governments, and individuals look to these cases for guidelines in determining their future conduct, but the courts themselves must study the cases for similar application, thereby giving the enunciation of principles decided on a case-by-case basis the appearance of policy enunciation.

It is the job of the federal courts, like other courts within the judicial systems of our many states, to resolve disputes which are placed before them by an appropriate mode of litigation initiation. These grievances flow from problems frequently found to exist in many more instances than the individual case pending before the court, but when the courts find continuous conduct to be unconstitutional or illegal they must decree its cessation and such decree will or may thereby effectively apply to many more situations of similar and concurrent illegality throughout the country.

Judicial power must be competent to give efficacy to the laws, both statutory and constitutional, and this means that remedies must be fashioned where rights have been found to be illegally denied.

Thus the mandatory injunction has imposed affirmative duties upon government, such as the development of due process procedures before property rights can be withheld by government, but in many instances these affirmative duties have been the only fair means to secure the liberties and rights guaranteed by our Constitution and the laws, as interpreted by the courts pursuant to their judicial functions.

Moreover, although the courts have clearly accepted a continuing role by oversight in the protection of civil rights in our school systems, I do not believe that to be the case in many other areas of the law. Where the only reasonable remedy available to ensure that each of our citizens receives the protection of all of their

civil rights is the unusual method of enjoining a defendant to seek, in effect, a declaratory judgment as to the validity of its conduct, it may be justified; otherwise, the use of future continued oversight is questionable in this writer's mind and ought to be avoided in the great bulk of cases.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

My concept and belief in the equal nature of intrinsic value of all persons and therefore their equal rights in our political and legal processes has been a part of both my personal life and professional career in dictating that I maintain an unbiased attitude not only to the more privileged, but to the less privileged of us. No single action in my personal life stands out beyond others in my mind, but I believe that those who know me will attest to my staunch adherence of treating racial and sexual minorities with the same dignity that I give to such majority members both personally and in my work.

Most of my assistance to pro bono legal representation of the disadvantaged has been directed through my activities in the Memphis & Shelby County Bar Association where I have worked as committee member, director and in the last four years as an officer. I am now President-Elect and am automatically slated to assume the Presidency for 1988. This bar association has been a prime mover in providing legal services to the disadvantaged first in its development of Memphis area legal service programs and now through PADLS (Private Attorneys Delivering Legal Services), its General Sessions criminal defense panel and its Lawyer Referral program which provides initial lawyer consultation to members of the public for a very small charge.

SUPPLEMENTAL RESPONSE

I. BIOGRAPHICAL INFORMATION

2. Address: List current place of resident and office address(es).

RESPONSE: Residence Information

4795 Briarcliff Road
Memphis, Tennessee 38117
901/682-5159

3. Marital Status (include maiden name of wife or husband's name. List spouse's occupation, employer's name and business address(es).

RESPONSE: On August 22, 1987, I married the former Kay Farese Luckett, whose maiden name was Farese. She is a self-employed attorney, licensed in Mississippi and Tennessee, whose address is Suite 2008, 100 North Main Building, Memphis, Tennessee 38103.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

RESPONSE: There have been no lapses with respect to my admission to practice law before any court to which I have been admitted.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

RESPONSE: With the exception of student law review comments in the Washington & Lee Law Review during 1965 and 1966, I have not edited any published material, nor have I made speeches on constitutional or legal policy issues.

II. FINANCIAL DATA AND CONFLICT OF INTEREST

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

RESPONSE: I expect to work out a withdrawal arrangement with my current law partners. The arrangement is presently being discussed among my partners and will probably be finalized sometime during September or October.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

RESPONSE: The only significant categories of litigation and financial arrangements that are likely to present a potential conflict of interest are those which involve the members of my present lawfirm or my spouse as attorneys. Perhaps I should also include the category of significant current clients, but other than those groups, I know of no categories that present potential conflicts at this time.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

RESPONSE: Attached to these responses is a copy of the Financial Disclosure Report filed by me July 6, 1987 as required.

III. GENERAL

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these reponsibilities, listing specific instances and the amount of time devoted to each.

RESPONSE: As indicated in my initial response to the Committee's Questionnaire (III/2) with respect to pro bono legal representation to the disadvantaged, I have participated in serving the disadvantaged through my work in the Bar Association where I have either served as a Director or an Officer for six years. The time has varied from year to year depending on which particular office I held, but in the last several years, I would estimate that I have spent approximately 100 hours a year on Bar Association activities. As mentioned, the Bar Association in the Memphis area provides a range of services for the disadvantaged.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates-- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

RESPONSE: I do not belong to any clubs that practice discrimination. I formerly belonged to the Memphis Country Club, a social and athletic club in which my father had been a member before me. I joined the club after law school and resigned it at the end of 1986. I mention my membership in that club because there are no black or Jewish members, although the club, to my knowledge, has no membership requirements or policies that would prohibit such memberships. It is my understanding that the club also has no full memberships available for women. I have expressed my personal views concerning the inappropriateness of membership restrictions based on race, sex or religion.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

RESPONSE: To my knowledge there is no selection commission in this jurisdiction. I believe that Congressman Sundquist discussed the various applicants with a number of lawyers before he made his recommendation to the President, but I was not personally a part of that process other than having submitted my name for consideration.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances

concerning your position on such case, issue of question? If so, please explain fully.

RESPONSE: No one involved in the process of selecting me as a judicial nominee has discussed any specific case, specific legal issue or specific legal question that might in any manner be interpreted as seeking express or implied assurances concerning my position on such matters.

AFFIDAVIT

I, Jerome Turner, do swear that the information provided in this statement is, to the best of my knowledge, true and correct.

August 4, 1987
DATE

Jerome Turner
JEROME TURNER

Sworn to and subscribed before me this 31st day of August, 1987.

Janet M. Wilson
Notary Public

My commission expires:
July 24, 1988

SF 278 (Rev. 1/88)
FPM Chapter 734
U.S. Office of Personnel Management

Financial Disclosure Report

Form Approved
OMB No. 3209-0002

Reporting Status (Check Appropriate Box)			Agency Use Only	OGE Use Only	Date of Appointment, Candidacy, Election or Nomination (Mo., Day, Yr.)	Termination Date (If Applicable) (Month, Day, Year)
☐ Incumbent	☒ New Entrant, Nominee, or Candidate	☐ Termination Filer			July 1, 1987	N.A.

Reporting Individual's Name	Last Name: Turner	First Name and Middle Initial: Jerome (NMN)
Position for Which Filing	Title of Position: District Court Judge	Department or Agency (If Applicable):
Location of Present Office	Address (Number, Street, City, State and ZIP Code): 12th Floor - 67 Madison Avenue Memphis, Tennessee 38103	Telephone No. (Include Area Code): 901-521-1111
Position(s) Held With the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: None	
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination: Senate Judiciary Committee	Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☒ No

Certification I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.	Signature of Reporting Individual: [signature]	Date (Month, Day, Year): July 6, 1987
Other Review (If desired by agency)	Signature of Other Reviewer:	Date (Month, Day, Year):
Agency Ethics Official's Opinion The information contained in this report discloses no conflict of interest under applicable laws and regulations.	Signature of Designated Agency Ethics Official/Reviewing Official:	Date (Month, Day, Year):
Office of Government Ethics Use Only	Signature:	Date (Month, Day, Year):

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I (Liabilities)**—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II (Agreements and Arrangements)**—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if comments are continued on the reverse side) ☐

PREVIOUS EDITION USABLE

278-1/88

NSN 7540-01-070-6441

SF 278 (Rev. 1/88)
1 FR Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting Individual's Name		Page Number		Schedule
Turner, Jerome	**Assets and Income**		2	A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

	BLOCK A Assets & Income Sources	**BLOCK B** Valuation of Assets								**BLOCK C** Income																	**BLOCK D** Transactions Test	
	Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)								Type of Income (X)							Other (Specify Type)	Category of Amount of Income (X)									Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schd. B Part I for these assets including those sold for a loss.	
		None (or less than $1001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
S or DC	Example: X Y Z Common / Doe Jones & Smith, Hometown, USA			X		X			X						ptnrship income			X							$60,000		X	
1	Wildman,Harrold,Allen,Dixon &McDonnell-law ptr-Memphis,TN															—												
2	Wildman,Harrold,Allen 5/31/87 - undrawn profits			X												—												
3	Wildman,Harrold,Allen estimated capital account						X									—												
4	Wildman,Harrold,Allen 1986 and 1987 income	—													ptr income										210,172			
5	paid thru 6-30-87																											
6																												
7	Footnote - I have signed a contract to purchase a home but since personal residences are excluded, I am also excluding this contract from both assets and liabilities.																											
8	Footnote - Stock value and income figures are based on most recent account statements, usually 5/31/87.																											
9																												
10																												

PREVIOUS EDITION USABLE

278-200

SF 278 (Rev. 1/95)
5 CFR Chapter XXIV
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name	Assets and Income	Page Number	Schedule
Turner, Jerome		3	A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the **actual** amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets								BLOCK C Income																				BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)								Type of Income (X)							Category of Amount of Income (X)														If yes, complete Sched. B Part I for those assets including those sold for a loss.	
	None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000			Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	YES	NO
S or DC — Example: X Y Z Common / Doe Jones & Smith, Hometown, USA			X						X						primship income			X						$50,000		X	
1 Union Planters Nat'l Bank checking account			X								X						X											
2 Union Planters Nat'l Bank savings account	X										X					X												
3 Union Planters Nat'l Bank common	X								X							X												
4 E F Hutton AMA cash fund		X							X		X								X									
5 Fidelity Cash Reserves - HR-10					X						X								X									
6 Union Planters Nat'l Bank HR-10 inclusive of:	—																			X								
7 Union Planters Temp Fund B				X					X		X					See line 6												
8 U.S. Treasury Bond				X							X					See line 6												
9																												
10																												

PREVIOUS EDITION USABLE

278-200

SF 278 (Rev. 1/95)
5 CFR Chapter XCVI
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name	Assets and Income	Page Number	4	Schedule A
Turner, Jerome				

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the **actual amount** of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

	BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets							BLOCK C Income																		BLOCK D Transactions Test	
	Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)							Type of Income (X)							Category of Amount of Income (X)											If yes, complete Schedule B, Part I for those assets including those sold for a loss.	
S or DC	Exam ples	None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	YES	NO
	X Y Z Common Doe Jones & Smith, Hometown, USA			X				X									X								X	
1	E F Hutton IRA inclusive of			X										partnership income	—								$50,000			
2	Cas Reserve Mtg. Inc.		X							X						X										
3	Hut on Government Fund			X						X						X										
4	Tre sury Bond Rec.		X												—											
5	Hom stead Savings & Loan C.D.		X							X							X									
6	163 Eastmoreland, Memphis 1/6 interest in house & lot			X											—											
7	Federal Land Bk. Ass'n stock			X											—											
8	New England Mutual Life Cash Value-insur. policies				X										—											
9	Equitable of Iowa Cash Value - insur. policy		X												—											
10																										

PREVIOUS EDITION USABLE

270-200

SF 278 (Rev. 1/95)
Office of Personal Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name	Assets and Income	Page Number	5	Schedule A
Turner, Jerome				

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the **actual amount** of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets							BLOCK C Income															BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)							Type of Income (X)							Category of Amount of Income (X)								Actual Amount Only If "Other" Specified	Date (Mo., Day, Yr.) Only If Honoraria	If yes, complete Schd. B Part I for those assets including those sold for a loss.	
		None (or less than $1001)	$1,001-$8,000	$8,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
S or DC	Exempt	X Y Z Common			X				X									X								X	
		Doe Jones & Smith, Hometown, USA		X											ptnrshp income									$50,000			
1		Ann borrison trust																									
		See attached account state-																									
2		ment which is the most re-																									
		cent I have at this time;																									
3		1/15 remainder interest				X											X										
		belc gs to reporting																									
4		indi id.																									
5		Acco nt Receivable - from		X													X										
		sale of membership Memphis																									
6		Coun ry Club																									
7																											
8																											
9																											
10																											

PREVIOUS EDITION USABLE

278-209

Statement Period	Soc. Sec./Tax I.D. #	Account Number
03/01/87-03/31/87	626 05 2278	C45 27642

JEROME MORRISON &
MARY F WHITMAN TTEE
FBO ANN MORRISON DTD
2/24/64 JJ MORRISON & SON
5307 RICH RD
MEMPHIS TN 38119-1936

ACCOUNT EXECUTIVE : EDGAR LEE GIOVANNETTI
TELEPHONE :
OFFICE : ONE COMMERCE SQUARE
MEMPHIS TENN 38103

ARA ACCOUNT

ARA HIGHLIGHTS FOR MARCH

ACTIVITY		MONEY FUNDS	OPENING	CLOSING	INCOME
0 CHECKS PAID	.00	HUTTON AMA CASH FUND	97,906	130,287	437.00
DEPOSITS	.00				

STATUS	
AVAILABLE ASSETS	182,823
BUYING POWER	185,072
PRICED PORTFOLIO	250,561
NET WORTH	250,561

DISTRIBUTION	REPORTABLE TO IRS THIS PERIOD	REPORTABLE TO IRS YEAR TO DATE
DIVIDEND	1,029.00	2,580.00
WITHHELD - FOREIGN TAX		7.37

ACCOUNT BALANCES	TYPE	CLOSING	OPENING
	MARGIN	.00	42.69

DATE	TYPE		TRANSACTION	QUANTITY	DESCRIPTION	PRICE	AMOUNT	BALANCE
3 06	1	B	BOUGHT	42	HUTTON AMA CASH FUND	1	42.00-	.69
3 10	2	I	CASH DIVIDEND		DAYTON HUDSON CORP		23.00CR	
	2	I	CASH DIVIDEND		INTL BUS MACHINES		330.00CR	
	2	I	CASH DIVIDEND		TRAVELERS CORPORATN		114.00CR	467.69
3 13	2	S	SOLD	200-	ACCOUNT CALL CHEMICAL NEW YORK CORP	45	8,817.70CR	
	1	B	BOUGHT	467	HUTTON AMA CASH FUND	1	467.00-	
	2	O	OPTION EXERCISED	200	CHEMICAL NY CP CALL MAR 87 PR 45 CHL CI			8,818.39
3 16	2	I	CASH DIVIDEND		HONEYWELL INCORP		50.00CR	
	1	B	BOUGHT	8,818	HUTTON AMA CASH FUND	1	8,818.00-	
	2	S	SOLD	100-	ASA LIMITED PUT MAY 87 PR 45 ASA QI	1 1/2	124.99CR	175.38
3 17	2	S	SOLD	100-	CHASE MANHATTAN PUT JUN 87 PR 40 CMB RH	3 3/8	312.48CR	487.86
3 18	1	S	SOLD TO PAY FOR BUY	518-	HUTTON AMA CASH FUND	1	518.00CR	
	2	S	SOLD	200-	AMER EXPRESS PUT APR 87 PR 75 AXP PO	2	360.97CR	
	2	B	BOUGHT	100	INTL BUSNS MACH CALL MAR 87 PR135 IBM CG	11 1/2	1,192.61-	
	2	B	BOUGHT	200	LITTON INDS CALL MAR 87 PR 80 LIT CP	3	642.45-	
	2	S	SOLD	200-	F W WOOLWORTH PUT MAY 87 PR 45 Z QI	1 1/2	262.78CR	205.83
5 26	1	I	DIVIDEND THRU 03-18		HUTTON AMA CASH FUND		437.00CR	
	1	B	REINVEST AMA A/C 03-18	437	HUTTON AMA CASH FUND		437.00-	
	2	I	CASH DIVIDEND		SMITHKLINE BCKMN CORP		75.00CR	
	2	S	SOLD	100-	PRICE 2 5/16 VALUE DATE 03 17 87 METRS MANVR CRP PUT APR 87 PR 45 MNC PI		206.24CR	75.71
1 23	2	S	SOLD	200-	ACCOUNT CALL CHRYSLER CORP	40	7,839.73CR	
	2	S	SOLD	100-	ACCOUNT CALL CHRYSLER CORP	45	4,419.85CR	
	2	B	BOUGHT	100	CBOE EXER CHRYSLER CORP CALL MAR 87 PR 45 C CI			
	2	B	BOUGHT	200	CBOE EXER CHRYSLER CORP CALL MAR 87 PR 40 C CH			12,335.29
24	1	B	BOUGHT	12,335	HUTTON AMA CASH FUND	1	12,335.86-	.29
25	2	S	SOLD	100-	INTL BUSNS MACH CALL APR 87 PR150 IBM DJ	3 3/4	349.98CR	
	2	S	SOLD	200-	LITTON INDS CALL JUN 87 PR 85 LIT FQ	4 7/8	926.06CR	
	2	S	SOLD	100-	SALOMON INC PUT MAY 87 PR 40 SB GH	1 1/2	124.99CR	1,401.32
26	1	B	BOUGHT	1,401	HUTTON AMA CASH FUND	1	1,401.00-	.32
27	2	S	SOLD	100-	ACCOUNT CALL SMITHKLINE BCKMN CORP	95	9,398.68CR	
	2	O	OPTION EXPIRED	100	CHRYSLER CORP PUT MAR 87 PR 50 C QJ			
	2	O	OPTION EXPIRED	200	CHRYSLER CORP PUT MAR 87 PR 45 C QI			
	2	O	OPTION EXPIRED	100	FIRST BOSTON PUT			

F. HUTTON & COMPANY INC.
PLACE ONE BATTERY PARK PLAZA
NEW YORK, NY 10004
Telephone: (212) 742-5000

AMA/ARA SERVICE CENTER
TOLL FREE 800-334-4636

SIPC

Securities Investor Protection Corp. protects securities accounts up to $500,000 for lost and securities with a maximum of $100,000 for cash. Additional protection of $9,500 securities in AMA/ARA accounts is provided through an independent company.

(CONTINUED)		TRANSACTION	QUANTITY	DESCRIPTION	PRICE	AMOUNT	BAL
	2	OPTION EXPIRED	200	MAR 87 PR 50 FBC OJ FIRST BOSTON PUT			
	2	OPTION EXPIRED	200	MAR 87 PR 45 FBC OI GENERAL MOTORS PUT			
	2	OPTION EXPIRED	100	MAR 87 PR 75 GM CO INTL BUSNS MACH PUT			
	2	OPTION EXPIRED	100	MAR 87 PR130 IBM OF INTL BUSNS MACH PUT			
	2	OPTION EXPIRED	100	MAR 87 PR140 IBM GN SALOMON INC PUT			
	2	OPTION EXPIRED	100	MAR 87 PR 40 SB GN SMITHKLINE BKGN CALL			9,39
	2	OPTION EXERCISED	100	MAR 87 PR 95 BKB CS			
03 30	1	B-BOUGHT	9,399	HUTTON AMA CASH FUND	1	9,399.00-	

SUMMARY OF YOUR TRANSACTIONS BY CLASS

OPENING BAL(CR)	B-BOUGHT(-)	S-SOLD(CR)	I-INCOME(CR)	CLOSING BA
42.69	34,736.06	33,662.37	1,029.00	

YOUR PORTFOLIO

TYPE	QUANTITY		SYMBOL			PRICE	MARKET VALUE	ANNUAL INCOME(EST)	CURRENT YIELD(%)
2	100	- *	ASA	ASA LIMITED		59.125	5,912	300	5.07
2	100-		ASAEH	ASA LIMITED CALL MAY 87 PR 60 ASA EH		19.750	1,975-		
2	100-		ASAQI	ASA LIMITED PUT MAY 87 PR 45 ASA QI		.250	25-		
2	200-		AXPPO	AMER EXPRESS PUT APR 87 PR 75 AXP PO	64.50	2.500	500-		
2	100	- *	CMB	CHASE MANHATTAN CORP		56.375	5,637	216	3.62
2	100-		CMBFH	CHASE MANHATTAM CALL JUN 87 PR 60 CMB FH		1.312	131-		
2	100-		CMBRH	CHASE MANHATTAM PUT JUN 87 PR 60 CMB RH		2.875	287-		
2	100	. *	CI	CIGNA CORP	59.75	62.000	6,200	280	4.51
2	100-		CI DL	CIGNA CORP CALL APR 87 PR 60 CI DL		2.812	281-		
2	100-		CI PL	CIGNA CORP PUT APR 87 PR 60 CI PL		.375	37-		
2	100-		CI PM	CIGNA CORP PUT APR 87 PR 65 CI PM		2.875	287-		
2	100	- *	DH	DAYTON HUDSON CORP	41.625	45.500	4,550	92	2.02
2	100-		DH DI	DAYTON HUDSON CALL APR 87 PR 45 DH DI		1.312	131-		
2	100-		DH PH	DAYTON HUDSON PUT APR 87 PR 40 DH PH		.125	12-		
2	100	- *	HON	HONEYWELL INCORP		70.500	7,050	200	2.83
2	100-		HONEN	HONEYWELL INC CALL MAY 87 PR 70 HON EN		3.375	337-		
2	200-		HCAPG	HOSPITAL CRP AM PUT APR 87 PR 35 HCA PG	39.125	.250	50-		
1	130,287			HUTTON AMA CASH FUND		1.000	130,287	7,361	5.65
2	200-		EFHPH	E F HUTTON GRP PUT APR 87 PR 40 EFH PH	39.125	.625	125-		
2	300	- *	IBM	INTL BUS MACHINES	150.875	150.125	45,037	1,320	2.93
2	100-		IBMDH	INTL BUSNS MACH CALL APR 87 PR140 IBM DH		11.500	1,150-		
2	100-		IBMDJ	INTL BUSNS MACH CALL APR 87 PR150 IBM DJ		4.500	450-		
2	100-		IBMPH	INTL BUSNS MACH CALL JUL 87 PR140 IBM GH		15.250	1,525-		
2	200	- *	LIT	LITTON INDS INC		82.875	16,575		
2	200-		LITPQ	LITTON INDS CALL JUN 87 PR 85 LIT PQ		3.375	675-		
2	200	- *	MHC	MFRS HANOVER CORP	41.125	42.500	8,500	656	7.71
2	200-		MHCDJ	MFTRS HANVR CRP CALL APR 87 PR 50 MHC DJ		.062	12-		
2	200-		MHCPI	MFTRS HANVR CRP PUT APR 87 PR 45 MHC PI		2.500	500-		
2	200	- *	MD	MCDONNELL DOUG CORP		78.125	15,625	464	2.96
2	100-		MD ED	MCDONNELL DOUG CALL MAY 87 PR 75 MD ED		5.375	537-		
2	100-		MD EP	MCDONNELL DOUG CALL MAY 87 PR 80 MD EP		2.125	212-		
2	200	- *	SLB	SCHLUMBERGER LIMITED		40.375	8,075	240	2.97

(CONTINUED) YOUR PORTFOLIO

TYPE	QUANTITY	SYMBOL		PRICE	MARKET VALUE	ANNUAL INCOME(EST)	CURRENT YIELD(%)
Z	100-	SLBEG	SCHLUMBERGER CALL MAY 07 PR 35 SLB EG	5.625	562-		
Z	100-	SLBEH	SCHLUMBERGER CALL MAY 07 PR 40 SLB EH	2.000	200-		
Z	100-	SB GH	SALOMON INC PUT MAY 07 PR 40 SB GH	2.437	243-		
Z	200-	TX PG	TEXACO INC PUT APR 07 PR 35 TX PG	.250	50-		
Z	200	* TIC	TRAVELERS CORPORATN	47.125	9,425	456	4.83
Z	100-	TICEJ	TRAVELERS CORP CALL MAY 07 PR 50 TIC EJ	.625	62-		
Z	100-	TICHK	TRAVELERS CORP CALL AUG 07 PR 55 TIC HK	.562	56-		
Z	200-	Z QI	F M MCDONORTH PUT MAY 07 PR 45 Z QI	.300	100-		
* LISTED OPTION AVAILABLE			PORTFOLIO TOTALS		250,561	11,986	4.62
		**** ACCOUNT NET WORTH			250,561 ****		

DON'T MISS THE OPPORTUNITY TO TAKE A $2000 TAX DEDUCTION FOR 1986. YOU HAVE UNTIL APRIL 15 TO CONTRIBUTE TO YOUR 1986 IRA. ASK YOUR ACCOUNT EXECUTIVE FOR MORE INFORMATION TODAY.

SF 278 (Rev. 1/84)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0040

Reporting Individual's Name: Turner, Jerome

Page Number	6	Schedule C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

	Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
S or DC	Example: First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	20 yrs.			X		
S or DC	Example: John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
1	Union Planters Nat'l Bank, Memphis, Tennessee	Promissory Note	1985	prime +1	91 days		X paid in full 2/3/86			
2	Union Planters Nat'l Bank, Memphis, Tennessee	Promissory Note	1985	prime +1	91 days renew	X				
3	Union Planters Nat'l Bank, Memphis, Tennessee	Promissory Note	1986	prime +1	90 days renew		X paid in full 1/14/87			
4	Union Planters Nat'l Bank, Memphis, Tennessee	3 Promissory notes in aggregate	1986	prime +1	91 days renew	X paid in full 1/14/87				
5	Union Planters Nat'l Bank, Memphis, Tennessee	Promissory Note	1987 various	prime +1	91 days	X				
6	New England Mutual Life Insurance Company	Policy loans against cash value	pre-1985	5&6%	N/A	X				

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☐

Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example: Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Home town, USA	7/76 ptnership agmnt.
Following my nomination, I have instituted negotiations with my law partners, in	Wildman, Harrold, Allen, Dixon, & McDonnell, Memphis, Tennessee	ptnership
an effort to reach a termination or severance agreement in the event my nomination		
is confirmed by the U.S. Senate. No agreement has been reached yet, but it will be		
finalized prior to my being sworn in and will provide that severance payments will		
be made over no more than three years following my appointment.		

PREVIOUS EDITION USABLE

278-188

SF 277 (Rev 1/80)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3206-0006

Reporting Individual's Name: Turner, Jerome

Page Number 7 | Schedule C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

		Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
S or DC	Example	Fm: District Bank, Washington, DC John Jones, 123 J St., Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware Promissory note	1981 1979	12% 10%	25 yrs. on demand	X		X		
1		Federal Land Bank of Louisville Interest rate tied to current rate at which FLBA lends funds; loan is secured by property and indemnity agreement.	Mortgage on former residence and farm	1975	FLBA FLOAT	25 yrs				X	
2											
3											
4											
5											
6											

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☐

	Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example:	Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Home town, USA	7/75 ptnership agmnt.

PREVIOUS EDITION USABLE

341

SF 278 (Rev. 1/95)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0006

Reporting Individual's Name
Turner, Jerome

Page Number	8	Schedule D

Part I
Positions Held Outside U.S. Government

1985 - 86 - 87

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples: Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/82	6/83
Examples: Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/76	11/85
Wildman, Harrold, Allen, Dixon & McDonnell, Memphis, TN	Lawfirm	Partner	7/78	present
Memphis & Shelby County Bar Association, Memphis, TN	Non-profit Bar Association	Secretary, Vice-President and President-elect	1985-86-87	present
Memphis & Shelby County Bar Foundation, Memphis, TN	Non-profit legal foundation	Director	late 86	present
Business I operated - no name - sole proprietorship	Raised cattle	Owner	about 1975	12/85
Member of scholarship advisory group - Mid South Alumni Chapter Washington & Lee University	Alumni group	Member	1/87	present

Part II
Compensation In Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☐

Source (Name and Address)	Brief Description of Duties
Examples: Doe Jones & Smith, Hometown, USA	Legal services
Examples: Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction
Wildman, Harrold, Allen, Dixon & McDonnell, Memphis, TN	Legal services
ABF Freight Systems, Fort Smith, Arkansas	Legal services in workmen's compensation cases
Aetna Casualty & Surety, Memphis, Tennessee office	Legal services - various cases
W.H. Armes, Memphis, TN	Legal services - personal injury case
Cessna Aircraft Company, Wichitau, Ks.	Legal services - litigation
Conticommodity; Chicago, Ill.	Legal services - various cases

PREVIOUS EDITION USABLE

278-1/95

SF 278 (Rev. 1/92)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name
Turner, Jerome

Page Number	9	Schedule D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples:	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/83	6/83
	Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/78	11/83

Part II
Compensation In Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☐

	Source (Name and Address)	Brief Description of Duties
Examples:	Doe Jones & Smith, Hometown, USA	Legal services
	Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction
	Hibernia National Bank, New Orleans, La.	Various litigation
	Sam Dattel, Brenda Dattel, Lisa Dattel & Edward Dattle, Memphis, TN	Legal services - appellate work - trust case
	EGS MetroCorp, Los Angeles, CA	Legal services - construction contract litigation
	Richard Falsenthal, Memphis, TN	Representation of Estate of S. Pollard
	Fidelity Federal Savings & Loan, Corinth, MS	Representation to recover defaulted loan
	Rogers Badgett, et al (28 clients) Key Largo, FL	Litigation involving oil investment fraud

PREVIOUS EDITION USABLE

278-10B

SF 278 (Rev. 1/95)
FPM Chapter 734
U.S. Office of Personnel Management

Reporting Individual's Name
Turner, Jerome

Form Approved
OMB No. 3209-0006

Page Number	10	Schedule D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples: Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/82	6/83
Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/75	11/83

Part II
Compensation in Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☐

Source (Name and Address)	Brief Description of Duties
Examples: Doe Jones & Smith, Hometown, USA	Legal services
Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction
Mid-South Packers, Tupelo, MS	Various litigation services
Charles Moore, Memphis, TN	Litigation re: forged deed of trust
Olin Chemical Corp., Stanford, CT	Litigation services
Prestige Foods, c/o David Gradwohl, Esq., Philadelphia PA	Age discrimination litigation
Richard Medical Corp., Memphis, TN	Pension Plan litigation services
George . Slaughter, Blytheville, AR	Loan litigation

PREVIOUS EDITION USABLE

278-1(8)

SF 278 (Rev. 1/92)
5 CFR Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name
Turner, Jerome

Page Number // Schedule D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution.

Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples:	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/83	6/83
	Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/76	11/83

Part II
Compensation In Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☐

	Source (Name and Address)	Brief Description of Duties
Examples:	Doe Jones & Smith, Hometown, USA	Legal services
	Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction
	DeWitt Stroud, Memphis, TN	Employment termination litigation
	Swearingen & Conaway, Memphis, TN	Various litigation services
	Union Planters National Bank, Memphis, TN	Various litigation services for bank.

PREVIOUS EDITION USABLE

278-1(8)

BERNARD H. SIEGAN

Birth:	July 28, 1924	Chicago, Illinois
Legal Residence:	California	
Marital Status:	Widower	
Education:	1942 - 1943	Chicago City Junior College Diploma
	1946 - 1949	University of Chicago Law School J.D. degree
	1947	Carnegie Institute of Technology
	1946, 1948, 1949	Roosevelt University
Bar:	1950	Illinois
Military Service:	1943 - 1946	United States Army
Experience:	1949 - 1952	Rosenberg, Stein & Rosenberg Attorney
	1952 - 1973	Siegan & Karlin Partner
	1968 - 1969	University of Chicago Law School Research Fellow
	1973 - present	University of San Diego Law School Adjunct professor of law, 1973- Professor, 1974 Distinguished Professor, 1975-pres.
	1985 - present	Commission on the Bicentennial of the United States Constitution Member

Office: University of San Diego
School of Law
Alcala Park
San Diego, California 92110
619 260-4600 x 4388
619 260-4583

Home: 6005 Camino de la Costa
La Jolla, California 92037

To be United States Circuit Judge for the Ninth Circuit

UNITED STATES SENATE

Committee on the Judiciary

Questionnaire for Judicial Nominees

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Bernard H. Siegan

2. Address: List current place of residence and office address(es).

Home: 6005 Camino de la Costa
La Jolla, CA 92037
(619) 459-2939

Office: University of San Diego
School of Law
Alcala Park
San Diego, CA 92110
(619) 260-4600 x4388

3. Date and place of birth.

Chicago, Illinois on July 28, 1924

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

I am a widower. I was married on June 15, 1952 to Sharon Goldberg who died on February 5, 1985.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Chicago City Junior College, Herzl Branch, 1942-43, 1946.
Diploma January 31, 1947.

Carnegie Institute of Technology, Pittsburg, PA. 1947, 3 mo. during service with the Army.

Washington & Lee, Lexington, VA 1945, 1 mo. during service with the Army.

Roosevelt University, Chicago, IL, 1946, 1948, 1949
Enrolled only to attend specific courses.

University of Chicago Law School, October, 1946-June, 1949

Awarded JD degree June, 1949.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Law firms:

June 1949-June 1952 – Rosenberg, Stein & Rosenberg
38 S. Dearborn St.
Chicago, IL — Associate
The law firm is no longer in existence.
The sole surviving partner is
Merwin Rosenberg
30 N. LaSalle St., 29th Floor
Chicago, IL

June 1952-June 1973 – Siegan & Karlin
11 S. LaSalle St.
Chicago, IL — Partner

Academic Institutions:

Oct. 1968-Sept. 1969 — University of Chicago Law School, Research fellow in law & economics.

Aug. 1973-present — University of San Diego Law School
Adjunct professor of law (1973),
Professor (1974),
Distinguished Professor (1975-).

1979-present — University of San Diego Law School, Director of Law and Economics Studies

Government:

1973-1976 — Dept. of Housing and Urban Development, Washington, DC — Consultant ("windfalls & wipeouts" project)

June 1981-April 1982 — President's Commission on Housing, Washington, DC — Commissioner

May 1985-May 1986 — Federal Trade Commission, Bureau of Competition, Washington, DC — Consultant (law & economics)

July 1985-present	Commission on the Bicentennial of the U.S. Constitution 736 Jackson Place Washington, DC	Commissioner
June 1986-present	U. S. Department of Justice Washington, DC	Consultant (Constitutional bibliography project)

Other Positions:

1955-64	S & K Lands Corporation* 11 S. LaSalle St. Chicago, IL	President
1955-68	Bersieg Corporation* 11 S. LaSalle St. Chicago, IL	President
1957-64	Norbe , Inc.* 11 S. LaSalle Chicago, IL	President
1962-65	Lotus Apartments* 11 S. LaSalle Chicago, IL	General Partner
1975-1980	Freedom Newspapers, Inc. 17666 Fitch Irvine, CA 92714	Weekly Columnist
1976-present	Urban Land Institute 1200 18th St.,N.W. Washington, DC 20036	Research Fellow (Honorary)
1980-1981	President-Elect Reagan's Task Force on Housing Washington, DC	Member
July 19-21, 1983	White House Conference on Productivity - San Diego Meeting San Diego, CA	Rapporteur

* Company engaged in real estate ownership and/or development.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Army of the United States, Serial No. 16168416. Enlisted November 30, 1942, called to active service March 9, 1943 and honorably discharged January 28, 1946. I held the ranks of private, private first class and technician fifth class. Since my discharge, I have had no connection with any branch of the services.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Research Fellow in Law and Economics, University of Chicago Law School, October 1968-September 1969.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association	Member
American Judicature Society	Member
Chicago Bar Association	Member

In 1963, I was a member of the ABA Section of Taxation. I do not recall how long my membership continued.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civil, educational "public interest" law, etc.).

I am not a member of any organizations active in lobbying before public bodies. I belong to the following:

Mengei Museum (folk art museum) Box 553, La Jolla, CA 92038

Freedoms Foundation	P. O. Box 706, Rte 23, Valley Forge, PA
President's Club	University of San Diego, Alcala Park, San Diego, CA 92110

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

State of Illinois, January 9, 1950.

U.S. District Court for Northern District of Illinois, January 11, 1950.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written.

Books

Land Use Without Zoning, D.C. Heath & Co., Lexington, MA, 1972

Other People's Property, D.C. Heath & Co., Lexington, MA, 1976

Economic Liberties and the Constitution, University of Chicago Press, 1980

Books of which I am Editor

Planning Without Prices D.C. Heath & Co., Lexington, MA 1977

The Interaction of Economics and the Law, D.C. Heath & Co., Lexington, MA 1977

Regulation, Economics and the Law, D.C. Heath & Co., Lexington, MA 1979

Government, Regulation and the Economy, D.C. Heath & Co., Lexington, MA 1980

Articles

"Non-Zoning in Houston", 13 Journal of Law and Economics 71 (1970).

"The Houston Solution: The Case for Removing Public Land Use Controls", Land Use Controls Quarterly, Sum. 1970.

"No Zoning Appears to be the Best Zoning," Farm and Land Realtor, October 1971.

"Zoning Restrictions--boom or bane?" The Guarantor Spring 1973.

"No Growth is Another Way of Saying Urban Sprawl," Baltimore Sun Mar. 11, 1973.

"Controlling Other People's Property Through Covenants, Zoning, State and Federal Regulation," 5 Environmental Law 385 (1975).

"Comment" (on Penn Central Transportation Co. v. New York), 30 Land Use Law and Zoning Digest No 9, 8 (1978).

"The Decline and Fall of Economic Freedom," Reason Magazine Jan. 1981.

"Report of the President's Commission on Housing," Nov. 1982 Land Use Law and Zoning Digest 7.

"The President's Commission on Housing: Zoning Recommendations," Nov. 1982 Urban Land 24

"Commentary on Redistribution of Income Through Regulation in Housing," 32 Emory Law Journal 721 (1983).

"Keynote Address, Oregon Land Use Conference," 14 Environmental Law 645 (1984).

"Rehabilitating Lochner," 22 Univ. of San Diego Law Review 453 (1985).

"Economic Liberties and the Constitution: Protection at the State Level," Cato Journal, Winter 1985.

"Commentary on Monahan Paper," Canadian Constitutional Conference, Toronto, April 10-13, 1986 (British Columbia Law Review forthcoming).

"Constitutional Limitations on the Taking of Private Property," Attorney General's Conference on Economic Liberties, July 14, 1986.

Monographs

Zoning and Non-Zoning--Trends and Problems, University of Chicago and Journal of Law and Economics, 1971 (also distributed by National Urban Coalition's Exclusionary Landuse Clearing House).

"Statement in Opposition to Proposed National Land Use Legislation," reproduced and distributed by Orange County Central Labor Council AFL-CIO, Home Builders of Southern

California, and CEEED (1974).

Costs and Consequences of Public Land Use Regulation, Moorman Lecture Series (1975).

The Rise and Fall of Economic Due Process--When the Supreme Court Championed and then Curtailed Economic Freedom, International Institute for Economic Research, 1983.

Chapters in Books

Titles of Chapters and Books	Publisher and Date
"No Zoning is the Best Zoning" No Land is an Island	Institute for Contemporary Studies San Francisco 1975
"Regulating the Use of Land " The Interaction of Economics and the Law	D.C. Heath & Co., Lexington, MA 1977
"Editor's Introduction: The Anomoly of Regulation Under the Taking Clause", Planning Without Prices	D.C. Heath & Co., Lexington, MA 1977
"Land Use Regulation at State and Federal Levels" Regulation, Economics and the Law	D.C. Heath & Co., Lexington, MA 1979
"Industrial Regulation: The Market versus Government" Government, Regulation and the Economy	D.C. Heath & Co., Lexington, MA 1980
"The Constitution and the Protection of Capitalism" How Capitalistic is the Constitution?	American Enterprise Institute Washington 1982
"Property, Economic Liberties and the Constitution" Resolving the Housing Crisis	Ballinger Publishing Co. Cambridge, Mass., 1982

"The Law and the Land" Private Rights and Public Lands	Heritage Foundation Washington, 1983
"The Economic Constitution in Historical Perspective" Constitutional Economics	Lexington Books Lexington, Mass, 1984
"The Supreme Court: The Final Arbitrer" Beyond the Status Quo	Cato Institute Washington, 1985
"Economic Liberties and the Constitution" The Encyclopedia of the American Constitution	MacMillan, New York, 1986

Reprints

"Non-Zoning: Economics & Consumers" (largely reprint of Chapter 2 Land Use Without Zoning). Materials on Intercollegiate Debate Topic Resolved: That the Federal Gov. Should Adopt a Comprehensive Proposal to Control Land Use in the U.S., U.S. Gov. Printing Office, Washington, 1975, Library of Congress Congressional Research Service.

"Non-Zoning in Houston," reprinted in full as a series of 9 installments by Colorado Springs Gazette-Telegraph and Santa Ana Register, 1972 and 1973.

"Zoning and Non-Zoning-Trends and Problems." Monograph circulated by National Urban Coalition's Exclusionary Landuse Clearing House, August 1971; reprinted in major part as Editorial Commentary by Barron's Magazine, June 21, 1971. Also reprinted in Perspectives Section, Chicago Tribune, July 11, 1971.

"No Growth is Another Way of Saying 'Urban Sprawl'" reprinted in full by Potomac Institute, Washington, D.C. (Successor to Exclusionary Landuse Clearing House), June 5, 1973; Farm and Land Realtor; Real Estate Appraiser; Orange County Business Magazine.

Writings Appearing in the Congressional Record

"'No Growth' is Another Way of Saying 'Urban Sprawl'", May 15, 1973.

"Rights of Property Owners," March 25, 1975.

"Benefits of Non-Zoning", June 1, 1975.

"Should There Be Greater Regulation of Land Use at the State and

Federal Levels", May 26, 1977.

Newspaper Columns

During the period 1975-1980 I wrote a weekly newspaper column for Freedom Newspapers that appeared in 28 daily and weekly newspapers owned by that chain and at times in other newspapers.

12. (continued)
Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I have delivered speeches at seminars, conferences and other meetings principally in two areas: Land use regulation and constitutional law. In most instances I have spoken extemporaneously and not read from a prepared text. My speeches have generally presented the views contained in my writings. I am submitting herewith in Supplement A the text of two speeches on zoning that set forth positions I presented in many extemporaneous talks.

"Zoning and Non-Zoning--Trends and Problems" Chicago 1971.

"No Zoning Appears to be the Best Zoning" Miami Beach 1971.

I have also included two articles on constitutional law which present in condensed form the ideas I presented in most speeches I have made on this subject in recent years.

"Court Should Close Door on Excessive Regulation," Washington Star, February 9, 1981.

"High Court Still Estranged from Economic Rights," Wall St. Journal, July 29, 1983.

The balance of the material submitted in response to question 12 consists of press reports about speeches I have made. These submissions are a representative selection of press coverage I have received over the years. My files containing press accounts are, of course, fully open to the Committee.

Land Use Regulation

"Lawyer Calls Recent 'No-Zoning" Help to City's Building Boom," The Washington Post, Saturday, March 10, 1973.

"Poor Hurt by Zoning--Siegan," Chicago Tribune, Sunday, October 29, 1972.

"Attorney Argues Against Zoning" by Bob Duke, The Pensacola Journal, Tuesday, December 21, 1971.

"Exclusion Is the Name of the Zoning Game" by Bernard Siegan, Chicago Tribune, Sunday, July 11, 1971.

"Attorney Seeks No Zoning; 'Ridiculous', Says City," Chicago Tribune, Thursday, May 27, 1971.

"Houston's No-Zoning Cited as Advantageous," The Washington Post, Saturday, February 13, 1971.

"Houston Called Prime Example of Big Benefits From No Zoning," Houston Chronicle, Wednesday, January 20, 1971.

Constitutional Law

"Economic Rights Seen in Constitution" by Donald C. Bauder, The San Diego Union, Sunday, December 18, 1983.

"Demystifying Deregulation" by Tom Walker, The Atlanta Journal-The Atlanta Constitution, Sunday, May 2, 1982.

All of the foregoing publications are contained in Supplement A attached hereto.

13. Health: What is the present state of your health? List the date of your last physical examination.

Good. October 31, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Member, President's Commission on Housing, (1981-82), appointed by the President in June 1981. The Commission was in existence from June 16, 1981 to April 30, 1982, and authored The Report of the President's Commission on Housing published in 1982 by the U.S. Government Printing Office.

Member, Commission on the Bicentennial of the U.S. Constitution, appointed by the President in July, 1985 to serve until December 31, 1989. The life of the Commission has since been extended to December 31, 1991. The 23-person commission was established by Congress to encourage and advance celebration of the 200th anniversary of the framing and ratification of the Constitution and Bill of Rights.

I have never held or sought elective office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I did not serve as a clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

See below.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

See below.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

June 1949-June 1952 Employee of legal firm. I was

employed as a clerk and after being licensed as an associate, by the firm of Rosenberg, Stein and Rosenberg, consisting of four partners and one associate. The firm was primarily engaged in the practice of real estate and corporate law. Usually under the direction of a partner, I worked on a wide variety of matters, including preparing, filing and arguing motions, and preparing and trying small claims matters. I also prepared forms and appeared before administrative agencies, concerned with rent control, workmen's compensation and zoning. I was allowed to and did represent clients of my own in essentially the same work.

June 1952-June 1973 Legal and Enterpreneurial. After resigning from the Rosenberg firm, I entered into a law partnership with Norman Karlin under the name of Siegan & Karlin with offices at 11 S. LaSalle St., Chicago. Mr. Karlin is now a professor of law at Southwestern School of Law, 675 South Westmoreland, Los Angeles, (213) 738-6805. During this period I practiced law and was also president or general partner of enterprises engaged in real estate ownership and development. Siegan and Karlin specialized in real estate law. We prepared contracts for purchase and sale of real estate, drafted long and short term leases, authored covenants for new subdivisions, carried on negotiations with municipal officials in relation to annexation, building, subdividing and zoning and prepared applications for and appeared at public hearings to seek land use dispensations. As subsequently detailed, we represented clients in lawsuits relating to this work.

Over the years, our firm handled a wide variety of other

legal matters - rent control petitions, tort claims and suits, divorces, small wills, defending condemnation suits, representing both landlords and tenants in forceable detainer proceedings, and house closings, among others.

During this period, I estimate I appeared before administrative or legislative bodies in about 80 public hearings on zoning matters. Many of these hearings involved more than one session.

In August 1971, Mr. Karlin moved to Los Angeles and I continued the firm's business until I moved to La Jolla, California on June 1, 1973.

1968-Present Academic. My academic career began with an appointment in 1967 as a Research Fellow in Law and Economics at the University of Chicago Law School. The fellowship was for the academic year 1968-69 and it was understood that I would continue practicing law during this period. Pursuit to the fellowship, I studied Houston's system of land use regulation and my research and conclusions are set forth in a 76-page article entitled "Non-Zoning in Houston" which appeared in the April 1970 issue of the Journal of Law and Economics (published by the University of Chicago Law School). Subsequent to the termination of the said fellowship, I lectured on the subject of the research at colleges and universities in various parts of the country.

In the summer of 1973, I was appointed adjunct professor of law at the University of San Diego. My rank was raised to professor in 1974 and distinguished professor in 1975. I was appointed Director of Law and Economics Studies in 1979. I have taught seminars in land use law (3 credits) and in constitutional

law (3 credits) and courses in law and economics (3 credits). The latter course involves economic analysis of judicial opinions in different areas of the law. Beginning in fall of 1980, I have taught annually the required course in constitutional law (6 credits). The class consists of 85 students, the maximum allowed. This class has usually been overscribed by at least 50%.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I specialized during my years of practice in real property law, and represented mostly clients engaged in real estate ownership and development. Thus, in addition to other clients, our firm represented on a retainer basis a major developer in the Northwestern suburbs of Chicago from February 1966 to February 1973. Typically, this client bought acreage, obtained needed zoning classifications, subdivided and improved the land and thereafter built houses or condominiums for sale or apartments for rent. We provided legal services in connection with all its business activities.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Occasionally.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

Almost all appearances were in state courts.

3. What percentage of your litigation was:

(a) civil;
(b) criminal.

Entirely civil.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Please see answer to question 18.

5. What percentage of these trials was:

(a) jury;
(b) non-jury.

All non-jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Siegan and Karlin participated in all of the following cases. I did all or most of the work.

1. Cosmopolitan National Bank of Chicago U/T 6073 v. Village of Skokie, Circuit Court of Cook County, Illinois, No. 60C433. Decree entered March 20, 1960 (slightly modified by order entered April 14, 1961).

Complaint for injunction on behalf of the owner of about 4 acres of vacant property located in the Village of Skokie to enjoin the municipality from enforcing sections of its zoning

ordinance forbidding the owner from using the property for the development of multiple family housing. Plaintiff complained that the provisions of the Village zoning ordinance forbidding this use and imposing intensity of use and height limitations were unconstitutional. On plaintiff's motion for summary judgment, Judge Daniel Roberts found that provisions forbidding construction of multiple and two-family dwellings on the property were invalid, but intensity of use and height limitations governing any such use were valid. An injunction was entered accordingly. The village did not appeal.

As I recall, I prepared most of the complaint, presented witnesses, submitted evidence, affidavits, and argued the matter. I also cross-examined the defendant's witnesses. The Village of Skokie was represented by its corporation counsel, Bernard P. Harrison, 4501 Grove, Skokie, IL (312) 673-5935.

2. Cosmopolitan National Bank of Chicago U/T 7696 v. Village of Skokie, Superior Court of Cook County, No. 60S11704. Decree entered in 1960.

Complaint for injunction on behalf of owner of seven continguous lots on heavily traveled thoroughfare in Village of Skokie to enjoin the municipality from enforcing its zoning ordinance forbidding development of the property for uses permitted under the B-3 (heavy business) zoning classification. As in the above case, I prepared the complaint and argued the case. Pursuant to an understanding with the municipality, a decree was entered voiding the existing zoning classification to allow erection of a nursing home. The Village was represented by

its counsel, Bernard P. Harrison (312) 673-5935.

3. Guarantee Bank and Trust Company U/T 641 v. Grenville Beardsley, Attorney General of the State of Illinois, Village of Niles, Village of Morton Grove and "unknown owners," Circuit Court of Cook County No. 60C2132. Decree for plaintiffs entered in spring or summer of 1960.

Complaint to Quiet Title by removing all claims of defendants restricting property to cemetery uses. Property had once been owned by a religious corporation which had intended to use it as a cemetery. No burials had ever been made. Decree entered by Judge Daniel Roberts confirmed title to property free and clear of all claims of defendants.

As I recall, I prepared the complaint, submitted evidence and argued most of the matter. Niles was represented by Henry Wells, deceased, and Morton Grove by James Orphan who now lives in San Diego County (619) 481-0634. Hoffman and Davis, 30 West Monroe St., Chicago, IL (312) 621-0300, also represented the plaintiffs.

4. In the matter of a Petition to Annex Certain Territory to the Village of Mount Prospect, County Court of Cook County, No. 62C0110, filed in early 1962 by Byron S. Matthews, attorney, 10 S. LaSalle St., Chicago, IL (no present listing), seeking to annex certain properties to Mount Prospect, IL. These lands adjoined on three sides acreage owned by our client, LaSalle National Bank U/T 22370 which had previously filed a petition to be annexed to the Village of Arlington Heights, a municipality that adjoined Mount Prospect. The proposed annexation to Mount

Prospect was in large part intended to surround the LaSalle Bank property and cause its involuntary annexation to that municipality. On behalf of LaSalle, Siegan and Karlin filed Objections to the Petition on constitutional and statutory grounds. The Court denied LaSalle's petition; whereupon it filed notice of appeal. The Court stayed the petitioner's annexation proceedings pending perfection of the appeal. Subsequently, Arlington Heights annexed the LaSalle property. The petitioners thereafter accepted the Arlington Heights annexation and LaSalle agreed to dismiss its appeal.

5. People of the State of Illinois v. Village of Wheeling in the Circuit Court of Illinois No. 66 L 10566 (Quo Warranto in 1966).

This case involved a dispute between two municipalities, the Village of Buffalo Grove and Village of Wheeling, about a 17-1/2 acre tract that each contended was within its corporate limits. Our client owned land adjoining the 17-1/2 acres and considered its interest would be best served if the land in question were part of Buffalo Grove. On behalf of our client who was not a party, I participated in the suit and the subsequent satisfactory settlement of it. Alvin Kornfeld, One North LaSalle St., Chicago, FR 2-1449 (no present listing) was the principal attorney for owners of the 17-1/2 acres.

6. In the Matter of Annexation of Territory to the Village of Palatine, Illinois, No. 65C01645, consolidated with People of State of Illinois, ex rel. City of Rolling Meadows v. Village of

Palatine, No. 66 L 4688, in the Circuit Court of Cook County (1966). This was a dispute about whether certain lands had been properly annexed to Palatine. We represented a client who sought to have its land annexed to Rolling Meadows which adjoins Palatine, but would be denied this opportunity if Palatine prevailed in the litigation. The parties were primarily the two municipalities but I consulted with and aided preparation of papers and presentation of argument of Rolling Meadows, whose attorney was Donald Rose, now at 1701 Golf Road, Rolling Meadows, IL (312) 981-8800. The lower court decided in favor of Palatine but was reversed on appeal. Our client was not party of record since its property was not annexed to Palatine. Attorney for Palatine was Wooster and Magolian, now at 616 North Court, Palatine, IL (312) 991-2250.

7. Weller Creek Drainage District v. Cosmopolitan National Bank in the Circuit Court of Cook County No. 65C0759 (1965). This suit was filed by the district to impose a drainage assessment over a large portion of land, about 50 acres of which were owned by our client. Siegan & Karlin filed objections to the petition along with attorneys for a number of other owners. The Court upheld the objections and dismissed the proceeding.

8. Lawrence and Beatrice Shapiro v. Kornick et al, Circuit Court of Cook County, Second Municipal District, No. 66 M 2 616, filed August 25, 1966 order finding for plaintiffs entered December 16, 1966. Defendants were represented by Albert L. Finston, then at 209 South LaSalle Street, Chicago (312) 332-0733. No listing for Mr. Finston appears in the current Chicago

phone directory. The suit in question was for breach of contract, the defendants having failed to pay plaintiffs per agreement previously executed. The court entered an order requiring payment pursuant to stipulation of the parties.

9. I am unable to locate my file on a suit we filed against the Village of Niles and the State of Illinois in about 1960 (1) to remove remains of bodies and headstones on an old, dilapidated, and unsightly cemetary, and (2) to eliminate governmental restrictions limiting the property to use as a cemetary. All of the headstones had been knocked down, broken, and pieces strewn over the ground. The owner and municipality cooperated to clear the land and title thereto under the order of a state court and with the approval of religious leaders. I prepared the complaint and other papers and presented the case to the court. The matter of vacating a cemetary is a very sensitive one: here it was accomplished with great concern and dignity. Being located close to a residentially developed area, the cemetary had become a nuisance. As I recall, there were about six burials on the site, all made in the early 19[illegible]. Pursuant to court order, remains of bodies were removed to graves located in another cemetary of the same religion and religious services were held. The suit was not controversial; no one entered any objection to the proceedings. Service on known and unknown relatives of the deceased was personal or by publication. The land was subsequently developed with homes. The attorney for Niles was James Geroulis, now a judge of the Circuit Court of Cook County, Richard J. Daley Center, Chicago, IL 60602 (312) 443-5915.

10. The Village of Bensenville, Ill.: Oak Park National Bank, U/T 3438 v. Village of Bensenville, Illinois, Circuit Court of DuPage County, No. 58-1749 (1958). I am unable to locate my file in this matter which was a suit to declare the existing single family zoning invalid. The case was settled to permit the erection of a moderate income townhouse development of 242 units. Suit was originally filed to obtain industrial zoning. The attorney for the Village was William Redmond, Bensenville, Illinois (312) 766-2730.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

a. During many years of my practice, I represented builders and land developers in various suburbs of Chicago in some or all phases of their business activities, from the purchase of land to the sale or lease of their units or of their entire developments (as briefly described in answers to questions 17 and 18). I believe that my services helped provide greater housing opportunities in the Chicago area.

b. In 1969-72 I participated in negotiating the terms and drafting the leases in behalf of the owner of the newly constructed Brandenbury Shopping Center in Arlington Heights, Illinois - a medium sized commercial development.

Questionnaire for Judicial Nominees

SUPPLEMENT A

Attached to I Biographical Information (Public)

Questionnaire for Judicial Nominees

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

Charitable Remainder Irrevocable Annuity Trust between Bernard H. Siegan and University of San Diego dated December 19, 1975, containing two Department of Water and Power of the City of Los Angeles, Waterworks Revenue Bonds, in the face amount of $5,000.00 each due November 15, 2015. Said trust provides that interest in the amount of 7.20 percent of the initial fair net market value of the said assets shall be payable to Siegan semi-annually during his lifetime, and upon his death and that of his spouse and any survivor shall become exclusive property of the University.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would recuse myself in suits in which companies I owned stock were either plaintiff or defendant. I would also recuse myself when present or prior relationships might suggest appearance of partiality.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

The Commission on the Bicentennial of the U.S. Constitution terminates December 31, 1991.

I may possibly teach a course in a law school.

4. Have you ever held a major position or played a major role

in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

Not applicable.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

FINANCIAL STATEMENT

NET WORTH

Bernard H. Siegan
As of December 31, 1986

Assets

Cash on hand and in banks	$ 10,000.00
U.S. Government securities and municipal securities (1)	1,570,000.00
Listed stocks (2)	76,000.00
Savings and loan accounts (3)	456,900.00
Real estate owned (4)	780,000.00
Auto	12,000.00
USD Trust--original value	10,000.00
IRA's	15,000.00
NY Life Insurance Annuity	3,000.00
TIAA annuity funds	47,600.00
Personal property	100,000.00
Total	$3,080,500.00

Liabilities

Real estate mortgages payable (5)	101,100.00
NET WORTH	$2,979,400.00

See exhibits attached

General Information

Contingent or other existing Liabilities: none
Are any assets pledged? no
Are you defendant in any suits or legal actions? no
Have you ever taken bankruptcy? no

BERNARD H SIEGAN
6005 CAMINO DE LA COSTA
LA JOLLA CA 92037

Exhibit (1)

U.S. Government Securities and Municipal Securities

ACCOUNT 1-0764-5 VERIFICATION STATEMENT AS OF 12-31-1986 PAGE 1

SECURITY	RECEIPT	PAR/SHARES	SECURITY DESCRIPTION	RATE	MATURITY	ACQUIRED	HLD FOR/PLEDGE	CO-ID.
022645DD0	548358	50,000.00	AMADOR VALLEY UHSD	6.100	02/15/89	100386		
032540CF1	235517	50,000.00	ANAHEIM COP BIGI IMP	8.400	08/01/89	120285		
130173TT4	264416	50,000.00	CALIFORNIA EDL FACS AUTH REV DTD 06/01/84 6.750 PCT	6.750	10/01/87	110185		
130173UV7	049052	80,000.00	CALIFORNIA ED FAC AUTH POOLED FAC PROJ MBIA	7.250	11/01/87	120685		
130173VM6	502424	25,000.00	CALIFORNIA EDL FACS AUTH REV DTD 12/01/84 7.500 PCT	7.500	04/01/88	082086		
1306169L2	049059	40,000.00	CALIFORNIA ST G.O. (BEAKER)	9.400	12/01/87	120685		
1306169V0	049061	50,000.00	CALIFORNIA ST DTD 05/01/82 11.000 PCT	11.000	04/01/87	120685		
130617HN6	485520	100,000.00	STATE OF CALIFORNIA G O REGISTERED	5.600	02/01/89	080186		
130617LW1	558669	45,000.00	STATE OF CALIFORNIA G O	5.500	08/01/89	101486		
130617MH2	049064	40,000.00	CALIFORNIA ST DTD 03/01/82 9.500 PCT	9.500	03/01/88	120685		
130617RH0	049065	25,000.00	CALIFORNIA ST DTD 11/01/83 7.000 PCT	7.000	11/01/88	120685		
130649AF2	516755	25,000.00	CALIF STATE PUBLIC WORKS BOARD-1986 SERIES A	5.100	09/01/89	030386		
1309347AV9	519100	75,000.00	CENTRAL VLLY FIN CORP CERT OF PART FRESNO & CLOVIS USD	6.000	08/01/89	090986		

2-0003
BERNARD H SIEGAN
6005 CAMINO DE LA COSTA
LA JOLLA CA 92037

ACCOUNT 1-0764-5 VERIFICATION STATEMENT AS OF 12-31-1986 PAGE 2

SECURITY	RECEIPT	PAR/SHARES	SECURITY DESCRIPTION	RATE	MATURITY	AQIRED	HLD FOR/PLEDGE	CO-ID.
226165EM6	335213	25,000.00	CRESTLINE & LAKE ARROWHEAD WATER G O	5.300	02/01/88	040186		
284065EC9	049066	20,000.00	EL TORO CALIF WTR DIST DTD 04/15/75 7.700 PCT	7.700	04/15/02	120685		
357157AT3	366785	10,000.00	FREMONT UNIFIED SCHOOL DIST COP CALIF	5.500	04/01/88	042286		
358187GW6	349426	100,000.00	FRESNO CALIF MULTIFAMILY MTG REV FLTG RT PUT 10/30/872100	6.625	10/30/05	040186		
399225AK7	049069	100,000.00	GROSSMONT HOSPITAL DIST LEASE REV STATE GLEE	6.500	09/01/87	120685		
4636323J6	477055	100,000.00	IRVINE RANCH DISTRICT MAND TENDER 12/01/87 @ 100.	6.750	10/01/09	121885		
5446746L3	049073	25,000.00	LOS ANGELES CNTY CALIF FLOOD CTL DIST	6.250	05/01/87	120685		
5967379F1	049076	50,000.00	PALMDALE CALIFORNIA SINGLE FAMILY MTG REV FGIC	6.250	04/01/87	120685		
7320933G2	049079	55,000.00	POMONA CALIF REDEV AGY SINGLE FAMILY MTG REV PUT 4/1/87	8.000	06/01/87	120685		
73955-4C2	553673	25,000.00	POWAY CA USD COP	6.000	08/15/89	101486		
796415AZ1	049082	50,000.00	COUNTY OF SAN BERNARDINO CERT OF PARTICIPATION	6.250	07/01/87	120685		

373

2-0004
BERNARD H SIEGAN
6005 CAMINO DE LA COSTA
LA JOLLA CA 92037

ACCOUNT 1-0764-5 VERIFICATION STATEMENT AS OF 12-31-1986 PAGE 3

SECURITY	RECEIPT	PAR/SHARES	SECURITY DESCRIPTION	RATE	MATURITY	AQIRED	HLD FOR/PLEDGE	CD-ID.
79728FBH3	251958	15,000.00	SAN DIEGO MFHR LOC CITIBANK	6.000	12/01/87	122705		
798311AC0	420505	100,000.00	SAN JUAN CA USD COP	6.250	05/01/88	060286		
798311AC0	423503	10,000.00	SAN JUAN CA USD COP	6.250	05/01/88	060286		

240

374

25,000.00	No. Ca. Pwr. Agy.	7.25	7/1/87
55,000.00	East Side Union High School SD	5.00	12/1/88
65,000.00	Sonoma County Wtn. Agency	4.60	2/1/89
25,000.00	California St. G.O.	4.10	3/1/89
25,000	Vallejo U.S.D.	3.40	6/15/89
35,000	Industry Urban Dev. Auth.	6.25	11/1/1990

$1,570,00.00 Total

...for any CMA program client are protected up to a total of ... Fixed-income securities held by the market price, if available. ... markets and are valued at the most recent bid or yield equivalent. Less actively traded issues may be priced by utilizing a yield ...

Code 7097 (Rev 2-86)

Merrill Lynch

Exhibit (2) Listed Stocks

CMA Cash Management Account Monthly Statement

ACCOUNT NO.	TAXPAYER NO.	STATEMENT PERIOD	PAGE	F/C
291-23713	348-20-7021	11/29/86 TO 12/31/86	2	1037

BERNARD H SIEGAN
6005 CAMINO DE LACOSTA

YOUR INVESTMENTS

QUANTITY	INVESTMENT DESCRIPTION	EQUITY SYMBOL	ESTIMATED CURRENT PRICE	ESTIMATED CURRENT MARKET VALUE	ESTIMATED CURRENT YIELD	ESTIMATED ANNUALIZED INCOME
	EQUITIES					
25	**AMH INFO TECH CORP	AIT	132.500	$3,312	3.77	$125
259	**AMERICAN TEL & TEL	T	25.000	$6,475	4.80	$311
50	**BELL ATLANTIC CORP	BEL	67.500	$3,375	5.33	$180
75	**BELLSOUTH CORP	BLS	57.750	$4,331	5.26	$228
200	**C P C INTERNTL INC	CPC	79.250	$15,850	1.56	$247
320	**FPL GROUP INC	FPL	31.625	$10,120	6.45	$653
50	**NIAG MOHAWK PWR CORP	NMK	16.750	$837	12.41	$104
50	**NYNEX CORPORATION	NYN	64.125	$3,206	5.42	$174
50	**PACIFIC TELESIS GRP	PAC	53.250	$2,662	5.70	$152
50	**PENNSYLV POWER&LIGHT	PPL	36.500	$1,825	7.12	$130
25	**SOUTHWESTERN BELL CP	SBC	112.250	$2,806	5.70	$160
61	**UNION PACIFIC CORP	UNP	62.250	$3,797	3.21	$122
15	UNION PAC CRP $7 25CVPRA		130.250	$1,953	5.56	$109
50	**U S WEST INC	USW	54.000	$2,700	5.62	$152
	CORPORATE / GOVERNMENT SECURITIES					
300	AM T&T NEW 15MY8 75X00RG		101.500	$304	8.62	$26
5000	OHIO BELL TL1JA8 75X10RG		97.872	$4,893	8.94	$437
1000	PAC NW BEL T10C8 62510RG		97.000	4970	8.99	$56
700	Eastern Airlines		9.5	6,650		
	TOTAL			$76,066		

243

375

Exhibit (3) Savings and Loan Accounts

Account No.	Balance as of Dec. 31, 1986
Home Federal, San Diego	
0679-002935 6	$15,000.00
0679-002154 4	19,400.00
0679-002145 2	6,700.00
0679-002324 2	29,400.00
Great American	
015-307-8936	66,300.00
015-311-6983	19,000.00
015-308-2094	49,600.00
Great Western	
128-602207-4	42,000.00
Flagship	
88-05642-9	56,000.00
Gibraltar	
86-0003743-7	55,000.00
86-0003684-7	25,000.00
Far West	
12-06465-5	44,000.00
12-06253-5	19,500.00
Sears Savings Bank	
1-12803702-5	10,000.00
TOTAL	$456,900.00

Exhibit (4) Real Estate

1. Single family residence at 6005 Camino de la Costa, La Jolla, CA. valued at $600,000.00 (December 31, 1986).

2. 75 acres vacant property located in Jamul, California, valued at $180,000.00 (December 31, 1986).

96-183 0 - 89 - 13

Exhibit (5) Mortgages

1. Mortgage on property located at 6005 Camino de la Costa payable to Glendale Federal Savings and Loan, Glendale, CA. Balance due $50,448.73 (November 1, 1986).

2. Purchase money mortgage on 75 acres of vacant property located in Jamul, California payable to Lyons Vista Partnership, c/o White and Robinson, 600 B. Street, Ste 2050, San Diego,CA 92101. Balance due $50,611.00 (November 1, 1986).

Questionnaire for Judicial Nominees

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Under our Constitutional system, a judge is an agent of government responsible solely for interpretating and applying the law. The structure of the federal government expressly contemplates a separation of legislative, executive, and judicial powers, except as otherwise provided. Thus the Constitution delegates a series of legislative or policy-making powers to Congress and authorizes it to make all laws necessary and proper for executing these powers. The organizational intention is that Congress should not exercise any powers beyond or not implicit in

the delegation, thereby limiting its legislative authority.

No policy-making or executive authority is granted to the judiciary. Consequently, the courts are left to exercise only those policy-making powers that are inherently related to the judicial function. These implied powers are those that must necessarily refer to the judiciary in the nature of that institution. The judicial power is distinguishable from one enabling the legislature or other governmental bodies to adopt various laws and regulations to deal with contemporary problems, and to enact taxation and spending measures. Nor does this power contemplate execution of laws. Consequently, under the American system of separation of powers, courts are necessarily limited in the relief they can provide.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

(a) As a personal matter, I believe in providing whenever possible legal information and services to people in need but unable to pay for these professional services. Accordingly, since obtaining my license to practice law, I have advised without charge dozens of individuals of many origins and backgrounds about their legal rights and obligations, often recommending that they consult another attorney when I had no answer to their problem or was in no position to help them. In one instance, I counseled a family of very limited means without fee for a period for over a year about a variety of matters including representing them in litigation (and once paying their court costs). It would not be appropriate for me to reveal

further information about this experience.

(b) Fred Schnaubelt was a member of the San Diego City Council from 1977 to 1981. Throughout this period he consulted me about legal and policy issues. Not infrequently Mr. Schnaubelt voted on an issue after discussing it with me. I also helped prepare contents of some of his writings and speeches. I never charged him any fee nor sought special favor for rendering these services. Prior to his election to the City Council, Schnaubelt was a member of the County Welfare Board. I frequently advised him in fulfilling his responsibilities in that position.

(c) For many years after completing my research fellowship at the University of Chicago Law School, I wrote and spoke about local housing regulations that limited the production and distribution of housing. In particular, I criticized zoning laws that excluded less affluent people from certain areas and increased the price of housing. My criticism was in large part directed at exclusionary zoning--i.e., regulations intended to exclude people of average or less income from an area--which is most adverse to what question 12 refers to as "equal justice under the law." My purpose was to help provide better and greater housing opportunities. (See exhibits contained in Supplement A attached to Part I.)

(d) During the nine months I was a member of the President's Commission on Housing, I devoted a large amount of time to my responsibilities, not infrequently about 30 to 40 hours per week. I was chairman of the regulations committee, and a member of the steering and drafting committees. I was

primarily responsible for preparing that portion of the Commission's report dealing with the impact of regulation on the cost and production of shelter, a major concern of our society. Commission members of course received no compensation; only stipulated reimbursement for traveling expenses. In my case the reimbursement was not sufficient to cover all costs.

(e) Since June of 1986 I have without charge directed for the Department of Justice the preparation of a bibliography on the original meaning of all the provisions of the U.S. Constitution. Under my supervision two instructors and four students at the Law School have been involved in this project which consists of listing references to original meaning as found in: (1) the debates of the framing bodies; (2) the debates of the ratifying bodies and related commentaries; (3) the scholarly works of the early constitutional commentators; (4) United States Supreme Court cases; and (5) the scholarly works of modern constitutional commentators. This undertaking will provide for better understanding of the Constitution.

(f) I have for a lengthy period been a professor of law at a salary far less than what I could obtain as a practicing attorney. In part my purpose was to help educate future lawyers, and thereby help provide for a better and more just society. Similarly, I have spent much time writing books and articles and speaking and lecturing for which I have obtained compensation for less than that offered in private law practice.

UNITED STATES SENATE

Committee on the Judiciary

Supplement to
Questionnaire for Judicial Nominees

I. BIOGRAPHICAL INFORMATION (PUBLIC)

No change.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I wish to add the following to my prior answer: Teachers Insurance and Annuity Association College Retirement Equities Fund in the amount of $42,676.87 (as of 3/31/87), and a supplemental Fund thereto in the amount of $26,863.02 (as of 3/31/87).

2. No change.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the Executive Personnel Financial Disclosure

Report, required by the Ethics in Government Act of 1978, may be substituted here.)

Copy of Financial Disclosure Report attached hereto.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Copy of letter from Lawrence Shapiro, dated May 3, 1987, is attached hereto. My estimate is that I devoted 10 to 15 hours serving Mr. Shapiro and his family.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that discriminates on the basis of race, sex, or religion. Do you currently, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

No.

3. (Judicial Nominees Only) Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

I am not aware there is a selection commission for federal appeals court judges in my jurisdiction.

In spring of 1985, I received a phone call from an employee of the Justice Department advising that I was being considered for an appointment as a judge of the Ninth Circuit Court of Appeals. When I replied that I was interested, the person stated that I would be interviewed. I was subsequently interviewed by a number of attorneys at the department and later advised that the department would not then recommend my nomination. I was again interviewed at the Justice Department in July, 1986, and this time advised that subject to certain additional approvals and clearances (FBI and ABA), the department would recommend to the President my nomination for the position. In January 1987, the President phoned to advise that if I was willing he would submit my nomination to the Senate. The nomination was subsequently submitted on February 2, 1987.

4. (Judicial Nominees Only) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any

specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

No.

AFFIDAVIT

I, BERNARD A. SIEGAN, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

JUNE 17, 1987
(DATE)

(NAME)

STATE OF CALIFORNIA
— SS
COUNTY OF SAN DIEGO

Subscribed and sworn to before me this 17th day of June, 1987 by BERNARD A. SIEGAN.

Kyle C. Poston
(NOTARY)

My commission expires: 3-4-88

OFFICIAL SEAL
KYLE C. POSTON
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Exp. March 4, 1988

Financial Disclosure Report

Filer Chapter 73e
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Status (Check Appropriate Box)			Agency Use Only	OGE Use Only	Date of Appointment, Candidacy, Election or Nomination (Mo., Day, Yr.)	Termination Date (If Applicable) (Month, Day, Year)
☐ Incumbent	☒ New Entrant, Nominee, or Candidate	☐ Termination Filer				

	Last Name	First Name and Middle Initial
Reporting Individual's Name	Siegan	Bernard H.
Position for Which Filing	Title of Position: Judge, Ninth Circuit Ct. of Appeals	Department or Agency (If Applicable)
Location of Present Office	Address: (Number, Street, City, State and ZIP Code) University of San Diego Sch.of Law Alcala Park, San Diego, CA 92110	Telephone No. (Include Area Code) (619) 260-4600 X4388
Position(s) Held With the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: Member, Commission on the Bicentennial of the U.S. Constitution	

	Name of Congressional Committee Considering Nomination	Do You Intend to Create a Qualified Diversified Trust?
Presidential Nominees Subject to Senate Confirmation	Senate Judiciary Committee	☐ Yes ☒ No

Certification	Signature of Reporting Individual	Date (Month, Day, Year)
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.	B. H. Siegan.	2/2/87
Other Review (If desired by agency)	Signature of Other Reviewer	Date (Month, Day, Year)
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official	Date (Month, Day, Year)
The information contained in this report discloses no conflict of interest under applicable laws and regulations.		
Office of Government Ethics Use Only	Signature	Date (Month, Day, Year)

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I (Liabilities)**—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II (Agreements and Arrangements)**—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

Copy

(Check box if comments are continued on the reverse side) ☐

PREVIOUS EDITION USABLE

NSN 7540-01-370-6505

388

SF 278 (Rev. 1998)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name	Assets and Income	Page Number	2	Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets								BLOCK C Income																BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)								Type of Income (X)							Category of Amount of Income (X)									If yes, complete Schedule B Part 1 for these assets including those sold for a loss.	
		None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	$250,001-$500,000	$500,001-$1,000,000	Over $1,000,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount Only If "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	YES	NO
SP DC	Example: X Y Z Common				X					X									X								X	
	Example: Doe Jones & Smith, Hometown, USA			X												partnership income									$50,000			
1	AMN Info Tech Corp.		X							X								X									
2	American Tel & Tel			X						X								X									
3	Bell Atlantic Corp.		X							X								X									
4	Bellsouth Corp.		X							X								X									
5	C P C Interntl Inc.				X					X								X									
6	FPL Group Inc.			X						X								X									
7	NIAG Mohawk Pwr Corp.	X								X								X									
8	NYNEX Corp.		X							X								X									
9	Pacific Telesis Grp		X							X								X									
10	Pennsylv Power & Light		X							X								X									

PREVIOUS EDITION USABLE

278-2000

SF 278 (Rev. 1/95)
5 CFR Chapter XIV
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name	Assets and Income	Page Number	3	Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets								BLOCK C Income														BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)								Type of Income (X)							Category of Amount of Income (X)										
		None (or less than $1001)	$1,001-$2,500	$2,501-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Royalties/ Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$1,000,000	Over $1,000,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schd. B Part I for those assets producing those items listed for a item. YES	NO
$ or DC	Examples: X Y Z Common				X				X										X							X	
	Doe Jones & Smith, Hometown, USA			X											partnership income									$50,000			
1	Southwestern Bell Cp		X						X									X									
2	Union Pacific Corp.		X						X									X									
3	Union Pac Crp: 97 25CVPRA		X						X									X									
4	U.S. West Inc.		X						X									X									
5	Eastern Airlines			X					X								X										
6	Amador Valley UHSD				X						X									X							
7	Anaheim Cop				X						X									X							
8	California EDL FACS AUTH				X						X									X							
9	California ED FAC AUTH (pooled)					X					X										X						
10	California EdL FACS AUTH				X						X								X								

SF 278 (Rev. 1/95)
Office Copies File
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting Individual's Name	Assets and Income	Page Number	4	Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets	BLOCK C Income																		BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)	Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)									Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schs. B Part I for those assets excluding those valued for a loss.	
	None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000			YES	NO
SP Employer: XYZ Common			X				X																	X	
DC Employer: Dee James & Smith, Hometown, USA		X											private income												
1 California St G.O. (bearer)			X						X								X								
2 California St			X						X									X							
3 State of California GO				X					X									X							
4 State of California GO			X						X						½	X									
5 California ST 9.500			X						X								X								
6 California ST 7.000			X						X							X									
7 Calif. State Public Wks			X						X							X									
8 Central Vlly Fin Corp. Cert.				X					X								X								
9 Crestline & Lake Arrowhead			X						X							X									
10 El Toro Calif Wtr Dist.			X						X							X									

Reporting Individual's Name

Assets and Income

Page Number 5 | Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets	BLOCK C Income																								BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)							Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)									Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schd. B Part I for those assets indicating these were held for a loss.	
	None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
S or DC Examples: X Y Z Common			X				X									X						-		X	
Doe Jones & Smith, Hometown, USA			X											primary income								350,000			
1 Dist. Fremont Unified School			X						X							X									
2 Mtg Fresno Calif Multifamily				X					X									X							
3 Lease Grossmont Hospital Dist				X					X									X							
4 Mand Tender Irvine Ranch District				X					X									X							
5 Flood Control Dist. Los Angeles Cnty CA			X						X							X									
6 Mtg. Rev. Palmdale CA Single Fam.				X					X								X								
7 Fam.Mtg. Pomona CA Redev Agy Sgl				X					X								X								
8 Poway CA USD			X						X							X									
9 Cert.of Particip County of San Berdardino			X						X								X								
10 San Diego MFMR Loc Citibank		X							X						X										

SF 278 (Rev. 1998)
FPM Chapter 735
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0006

Reporting Individual's Name	Assets and Income	Page Number	6	Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources			BLOCK B Valuation of Assets							BLOCK C Income																		BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐			Category of Value (X)							Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)										Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Subd. B Part I for those assets contributing those rental for a loss.	
			None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000		Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$1,000,000	Over $1,000,000			YES	NO
S or DC	Exemplar	XYZ Common			x					x									x									x	
		Doe Jones & Smith, Hometown, USA			x											gov'ts income											190,000			
1		San Juan CA USD COP					x					x									x									
2		San Juan CA USD COP			x							x							x											
3		No.CA. Pwr. Agy.				x						x								x										
4		East Side Union HighSch.					x					x									x									
5		Sonoma County Wtr.Ag.					x					x									x									
6		California St. G.O.				x						x								x										
7		Vallejo U.S.D.				x						x								x										
8		Industry Urban Dev.Auth.				x						x								x										
9		AM T&T New 15MY3	x									x					x													
10		Ohio Bell TLiJAJ		x								x						x												

SF 278 (Rev. 1/92)
Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name	Assets and Income	Page Number	7	Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA owners, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets	BLOCK C Income																								BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)								Type of Income (X)							Category of Amount of Income (X)									Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Sched. B Part I for those assets including those sold for a loss.	
	None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
S DC Examples: XYZ Common			x				x									x										x	
Doe Jones & Smith, Hometown, USA		x											partnership income									$50,000				
1 PAC NW Bel T10C8	x								x					x												
2 Bonds Matured:																										
3 Bonds 10.5% California General Obl.			x						x									x								
4 Bonds 4.6% California General Obl.			x						x							x										
5 Modesto Cal. Bonds			x						x								x									
6 Bonds California General Obl.			x						x									x								
7 Santa Cruz Cal. Bond			x						x						x											
8 U.S. Treasury Notes					x				x										x							
9 Bonds California General Obl.			x						x							x										
10 Facilities Bd California Educational				x					x								x									

SF 278 (Rev. 1/98)
Office of Personnel Management

Reporting Individual's Name

Assets and Income

Page Number 8 Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets							BLOCK C Income																				BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)							Type of Income (X)							Category of Amount of Income (X)													If you, complete Items, 8 Part I for those assets (excluding those sold for a loss.	
	None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Exempted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	YES	NO
S or DC / Examples: XYZ Common				X			X									X									X	
S or DC / Examples: Doe Jones & Smith, Hometown, USA			X										promo income									$20,000				
1 California Veterans Bd.				X					X								X									
2 LA Water, Pwr & Lt. Bd.				X					X							X										
3 Pittsburg CA Rev. Bds.					X				X								X									
4 Shasta CA Bds.				X					X								X									
5 SCI Accounts: Home Federal, San Diego					X				X									X								
6 Great American						X			X									X								
7 Great Western				X					X								X									
8 Flagship					X				X								X									
9 Gibraltar					X				X									X								
10 Far West					X				X								X									

SF 278 (Rev. 1/95)
Filer Checklist 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0740

Reporting Individual's Name	Assets and Income	Page Number	9	Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets	BLOCK C Income																													BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)									Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)										Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schedule B, Part 1 for these assets including those sold for a loss.	
	None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000											None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000			YES	NO
S or DC Exemplar: X Y Z Common			X				X											X										X	
DC Doe Jones & Smith, Hometown, USA			X													pension income										$80,000			
1 Sears Savings			X						X								X												
2 First Interstate Bank (Ckng.acct)		X							X									X											
3 University of San Diego Trust			X						X									X											
4 N.Y. Life Insurance Annuity		X							X									X											
5 IRA accts at First Interstate Bank				X					X									X											
6 75 acres vacant property in Jamul, CA					X											no income													
7 TIAA annuity funds				X					X												X								
8 Cal Gen Obl Bds. 4.6T					X					X											X								
9 Modesto CA Bds.					X					X								X											
10 Santa Cruz. CA Bds				X						X									X										

SF 278 (Rev. 1/95)
Final Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting Individual's Name	Assets and Income	Page Number	10	Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets								BLOCK C Income														BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)								Type of Income (X)							Category of Amount of Income (X)									If yes, complete Items B & Part I for these assets excluding those valued for a less.
		None (or less than $1001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	Over $250,000			Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	Over $100,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	YES	NO
S or DC	Examples:																								
	X Y Z Common				X					X									X						X	
	Doe Jones & Smith, Hometown, USA			X												[illegible] income								$80,000			
1	Auto				X																						
2	Personal property						X																				
3																											
4																											
5																											
6																											
7																											
8																											
9																											
10																											

SF 278 (Rev. 1/88)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0007

Reporting Individual's Name

Page Number	11	Schedule D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples: Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/83	6/83
Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/78	11/83
University of San Diego San Diego, CA 92110	University	Professor of Law	8/73	current
Commission on the Bicentennial of the U.S. Constitution		Commissioner		

Part II
Compensation In Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☐

Source (Name and Address)	Brief Description of Duties
Examples: Doe Jones & Smith, Hometown, USA	Legal services
Moore University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction
Social Philosophy & Policy Center,, Bowling Green,OH Bowling Green University	Manuscript for books Parriciparion at conference

PREVIOUS EDITION USABLE

278-1/88

SF 278 (Rev. 1/88)
FPM Chapter 735
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0006

Reporting Individual's Name	Page Number	12	Schedule C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

		Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X)				
							$10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
S or DC	Exemplar	First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	25 yrs.			X		
		John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
1		Lyons Vista Partnership c/o White & Robinson, 600 B St San Diego,CA 92101	Mortgage in vacant property, Imuel CA						X		
2											
3											
4											
5											
6											

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☐

	Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example:	Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Home town, USA	7/79 ponership agmnt.

PREVIOUS EDITION USABLE

278-1/88

SF 278 (Rev. 1/88)
Prior Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0006

Reporting Individual's Name

Page Number	13	Schedule B

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE ☐

S or DC	Example:	Identification of Asset	Type of Transaction (X) Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	Amount of Transaction (X) $1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	$250,001-$500,000	Over $500,000
		X Y Z Common	X			3/1/83			X			
1												
2												
3												
4												
5												
6												

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only:
Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. Exclude transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), exclude gifts from relatives and exclude gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE ☐

S		Source (Name and Address)	Brief Description	Value
	Example:	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/83	$500
	Example:	Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
1				
2				
3				
4				
5				
6				

PREVIOUS EDITION USABLE

278-108

400

May 3, 1987

To whom it may concern:

Re: Professor Bernard H. Siegan

In 1966, I appealed to and received valuable legal counsel and aid - at no charge - from the above named professor, who was then an attorney on La Salle St., in Chicago, Il.

Attorney Siegan had been an acquaintance of my older brother, and so, I sought him out for aid, and since I had experienced dire financial circumstances, he immediately undertook to straighten out the financial and legal problem I brought to his attention.

As best as I can recall, the problem was one involving non-performance of a (a valid agreement) contract that was to provide me and my family with 1 year's monthly payments at $150.00 each toward rental of an apartment - for which I had agreed to give up possession of a home which I had purchased on a contract basis. As the contractors had agreed to these payments, on my leaving their originally built property - I had also agreed to forgive them for various construction problems, defects and other misrepresentations which had arisen in our transaction on the consideration of dropping all charges and counter charges, I had accepted and signed a valid contract, aforementioned, to leave their premises and since I was financially in distress the $150.00 per month payments were to help me relocate. After moving and receiving 1 monthly installment, the payments stopped. At this point, I was in need of legal assistance, and Mr. Siegan studied the entire matter, contacting all parties to the non-performing contract and when it became apparent to him that the payments could not be reinstated due to a disagreement of the partners of the paying side he, Mr. Siegan, then proceeded to take this matter to the circuit court (I believe in Evanston, Ill.) whereupon the failure to show up by the parties on the contractor's side allowed for a judicial court order to be issued which demanded resumption of the previously defaulted payments to me. The payments were then promptly resumed and completed thus helping me and my family through a difficult period.

I and my family are very grateful to Mr. Siegan for his many hours of study and legal help for which he never asked nor wanted reimbursement.

Mr. Siegan represents, in my opinion, the highest regard for the legal professional standards, ethics and need to provide just remedies for cases brought to him by clients regardless of financial status.

The above represents the best that my memory can produce after a period of some 21 years -- I have been unable to locate any written memoranda of these events; but, perhaps the Professor's files or the circuit court of the district where the court order was entered could verify the data referred to.

Very truly yours,

Lawrence Shapiro
Lawrence Shapiro
6651 N. California Ave.
Chicago, Ill. 60645
(312) 743-1315

May 3, 1967

To whom it may Concern

Re: Professor Bernard A. Riggan

In 1964 I appealed to and received valuable legal Counsel and aid-at-no charge from the above named professor who was then an attorney and to both of us, a stranger.

Attorney Riggan had been an acquaintance of my wife's family and mine for many years and knew of our financial circumstances to immediately undertook to straighten out the financial and legal problem I brought to his attention.

As best as I can recall, the problem was one involving non-performance of a contract (a valid agreement) that was to provide me & my family with 4 years rent payment at $100.00 each toward rental of an apartment — for which I had agreed to give up possession of a home which I had purchased on a contract basis. As the Contractors had agreed to these payments, on my leaving their originally bought property — I had also agreed to forgive them.

[illegible] construction problems, [illegible] defects [illegible] page 2
which had arisen in our transactions with the Corporation
of dropping all charges & counter charges & I had
accepted and signed a valid contract, aforementioned to
lease their premises & pay them [illegible] in the
sum of $150.00 per month payments were to begin on
alternate. After moving and receiving 1 month's rent
the payments stopped. At this point I
in need of legal assistance & we began proceedings
extinguishing contractual [illegible] parties in the state
Court for breach contract & when it became apparent to
them that the payments would not be reinstated prior
to a disposition of the matter in the proper forum
in Oregon, they proceeded to take the building &
the current value of [illegible] in connection [illegible]
upon the failure to show up by the parties on the
contractor's side allowed for a federal court order to
be served which demanded resumption of the [illegible]
defaulted payments to me. The payments were then
promptly resumed and completed thus helping me
and my family through a difficult period.

I and my family are very grateful to [illegible]
people for the many hours of study and legal help
for which he never asked for additional reimbursement.

Mr. Berman represents, in my opinion, the highest [illegible]

beyond for the legal professional standards (page 3)
need to provide just remedies for cases brought to
him by clients regardless of financial status.

The above represent the best that my memory
can produce after a period of some 20 years -- I
now [illegible] to locate any written memoranda
of these events; but, perhaps the Professor's files or
the Circuit court of the district where [illegible] could
[illegible] would verify the data referred to.

Very truly yours,

Laurence Shapiro

LAURENCE SHAPIRO
6651 N. CALIFORNIA AVE.
CHICAGO, ILL. 60645
(312) [illegible]

CONFIRMATION HEARING ON: ROBERT N. MILLER, STEPHEN S. TROTT, ALFRED M. WOLIN, AND SAMUEL R. CUMMINGS

FRIDAY, NOVEMBER 13, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 8:31 a.m., in room S-226, Dirksen Senate Office Building, the Hon. Patrick J. Leahy (acting chairman) presiding.

Also present: Senators Thurmond and Heflin.

Staff present: Steven J. Metalitz, chief nominations counsel; Andrew Rainer, investigative counsel; Robert J. Short, minority chief investigator.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. The committee will come to order.

This morning, the Judiciary Committee will hold its 17th hearing so far this year to consider nominations to the lower Federal courts. Based on some of the misinformation given to the press by some in the Justice Department, this may come as a surprise to them, but as of the end of today's hearing, we will have held hearings on 50 nominations of the 63 that we have received, notwithstanding the fact that we continuously have these Supreme Court nominations coming up this year, which changes things around. We have had three Supreme Court nominations so far this year, although I understand that is all we will get this year.

Today, we will take testimony on four nominations, beginning with the nomination of Robert Miller, to be U.S. District Judge for the District of Colorado. We will also hear testimony from Assistant Attorney General Stephen Markman on this nomination. Mr. Markman speaks often in public on nominations, so I am glad he is able to take time to be here for this. I appreciate the fact that we finally got the material from the Justice Department that we have been asking for for some time. They were able to take time at the Justice Department for that, too, which makes it possible to go forward with this hearing.

Our proceedings on this nomination will conclude no later than 10:30, because we will take testimony on three more judicial nominations. Associate Attorney General Stephen Trott has been nominated to the Court of Appeals for the Ninth Circuit. Mr. Trott, we are glad to see you here. Judge Alfred Wolin has been nominated to be a U.S. District Judge for the District of New Jersey, and

Samuel Ray Cummings has been nominated to be U.S. District Judge for the Northern District of Texas.

As we customarily do, we will hear first from Senators and Members of the House of Representatives, who wish to introduce the nominees to this committee. For the convenience of the Senators from New Jersey and Texas, we will defer their introductory statements until later in this morning's hearing. I know that Senator Armstrong has a matter on the floor and I am going to ask him first to introduce Mr. Miller, as I know he is going to have to be leaving.

Before we turn to Senator Armstrong, let me note for the record that each nominee before the committee today has completed an extensive questionnaire on his qualifications, experience and financial situation. The publicly-available portions of these questionnaire responses will be printed in the record of this hearing.

We will also keep the record open for a limited time for follow-up questions to the nominees, any that Senator Thurmond or members on his side wish to submit or any on this side, and for additional questions that may be submitted by any committee members who are unable to be present for this morning's hearing.

We will also include in the record complete introductory statements of Senators, including those who are unable to attend personally this morning due to conflicting schedules.

So, Senator Armstrong, I wonder if you might bring Mr. Miller forth so we could meet him. Mr. Miller, you have already introduced your wife and maybe you could again for the record, if you would.

Mr. MILLER. Yes, sir, my wife, Diane, is sitting in the front row.

Senator LEAHY. It is nice to see you here.

Do you have any other member of your family here?

Mr. MILLER. No, I do not.

Senator LEAHY. Okay. Mrs. Miller, I am delighted to have you here. I am sure this must be a matter of pride to be able to be here. As I said to you and your husband, we try to make it look like Colorado is supposed to look this time of the year, with the snow, but I understand you probably have got about as little snow in Colorado as we have up in Vermont.

Senator Armstrong, go ahead.

STATEMENT OF HON. WILLIAM L. ARMSTRONG, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator ARMSTRONG. Mr. Chairman, I thank you for giving me a chance to come by for a moment. Let me note for the record and also for the information of everyone who is here that my colleague, Tim Wirth, was here a moment ago and joins me in expressing appreciation to you and to the committee for holding this hearing and urges that the committee come to a prompt conclusion on this matter, because both Senator Wirth and I feel it is important that we get this vacancy filled, in the interest of the district bench in Colorado and in the interest of the people who have business before that court.

Senator Wirth had another long-scheduled event at 8:30 this morning, but I particularly wanted to note his presence and he has asked me to do so.

Senator LEAHY. I did see Senator Wirth here before. Unfortunately, it is impossible to get a time that fits everybody. Please extend to Tim that we note that he was here.

Senator ARMSTRONG. Mr. Chairman, I appreciate that and I will do so.

Mr. Chairman, I am going to be very, very brief, but I do want to express my great interest in this matter. As you know, Mr. Miller, Robert N. Miller, has been nominated by President Reagan on the 5th of February to fill a long-standing vacancy on the bench in the U.S. District Court for Colorado.

For the past 16 years, Robert Miller has been a State and Federal prosecutor. He is currently the U.S. Attorney for the District of Colorado and has served in that post since 1981.

While serving as U.S. attorney, Mr. Miller has had a number of noteworthy accomplishments, including developing the Nation's first victim witness program. Prior to serving as U.S. attorney, he was the district attorney for Weld County, Colorado, and in that role he was involved in drafting significant legislative initiatives, including measures dealing with sentencing and parole eligibility.

He also successfully prosecuted one of the first known serial murderers. Mr. Miller received his law degree from the University of Colorado Law School in 1965. He was the president of the legal fraternity and director of the Legal Aid Society.

After law school, he joined the Air Force, where he rose to the rank of captain. He served as an Air Force legal officer, both prosecuting and defending in courts marshal.

After military service, he worked in private legal practice and then in 1971 began his career as a district and Federal prosecutor.

Mr. Chairman and members of the committee, Bob Miller has taken a leadership role in a number of civic and legal organizations, including the Colorado Bar Association, the Rocky Mountain Drug Task Force, the Greeley Boys Club and Rotary. He has been an instructor of law at American University, the University of South Carolina, Ames Community College, and the Colorado Law Enforcement Training Academy.

I would like, in closing, Mr. Chairman, to emphasize the urgent need for prompt action on this matter. I do not criticize the committee for a long delay in coming to this hearing, because I am aware that there has been a dispute between the committee and the Justice Department, and I guess, as I have said publicly on a number of occasions, those things will arise and I just would not want that to reflect upon Mr. Miller and I judge, from the way this is developing, that whatever differences of opinion arise between the Senate Judiciary Committee and the Justice Department in fact are separate from Mr. Miller's qualifications for office.

But I do note that there are a backlog of cases on the district court and so when the committee has completed its deliberations, I hope that the Senate will be able to move forward very promptly on this matter.

Now, Mr. Chairman, I am going to reluctantly excuse myself. Under the order which the Senate entered last night, I am re-

quired to be on the floor to make a point of order and debate the merits of that, and that vote will occur at 10:00 and I must go, but again my thanks.

Senator LEAHY. I understand. I am glad to have you here. I might say that it was not until you gave your speech on the floor in August, I believe it was, that the ice started to melt just a tad over at the Justice Department. I had been making inquiries of them since April and getting absolutely nowhere regarding Mr. Miller's case. I think your gentle prodding—maybe that is the diplomatic way of putting it—started opening that up, and so I appreciate that. I think had you not spoken up, probably we would still be waiting.

Senator ARMSTRONG. I thank the Chair.

Senator LEAHY. Congressman Brown of Colorado is here. Congressman, I apologize. I glanced very quickly at the witness list before and, of course, I should have recognized you immediately to be at the table with Mr. Miller. We are delighted to have you here.

STATEMENT OF HON. HANK BROWN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. BROWN. Mr. Chairman, thank you. With your permission, I would like to submit my statement for the record and simply add some personal comments, if I may.

Senator LEAHY. Certainly. Please do so.

Mr. BROWN. I come as a very biased witness. I have known Bob for 16 years and I think the world of him. He is an outstanding prosecutor, a good friend, a person of great merit in the community, and I suppose that is where I have known him. It is with some pride that our county prosecutor would become involved not only in the State Prosecutors Association, but become U.S. attorney.

About the only negative thing I can relate to you about Bob is when he ran for district attorney, he won with obscene margins that far exceeded the person who represents him in Congress.

Senator LEAHY. I recall. Mr. Miller may not recall this, but he and I met years ago, back when I was vice president of the National District Attorneys Association, and he was the new prosecutor from that area.

Mr. MILLER. I do remember that.

Senator LEAHY. Go ahead, please, Congressman.

Mr. BROWN. I just wanted to express to you my heartfelt thanks that you would hold the hearing and bring this matter up. You know, these matters, as I know you appreciate, are traumatic for anyone involved when your personal reputation is on the line, and Bob's case particularly has involved some allegations.

I think it is appropriate that he have a chance to deal with those and dealt with them in depth, and I am confident that, as I know Bob very well, that any questions of those kinds can be quickly resolved.

I would like to just share a minute with you on one issue that I think is perhaps substantive. I know there have been some questions raised as to whether or not a particular letter from the Attorney General should have been disclosed in the form that the committee has.

I would confess that it would take a better lawyer than I to answer that question, but I would submit this for your consideration: If the question is whether or not it should be listed on the form, I think you will have to deal with that in your own judgment, but the question is whether or not Bob in any way tried to conceal the information that that letter involved.

I think the record is extremely clear. Bob has been open and forthright in discussing that, and before the issue was ever raised with the staff of this committee, Bob had discussed that letter in depth with the American Bar Association representative, Jim Clark, voluntarily. He had also discussed it in depth with the representative of the Federal Bureau of Investigation. He had also discussed it in depth with the 16 members of Senator Wirth's Judicial Nominee Commission. He had also discussed it in depth with the Department of Justice.

So, while a question may have been raised with regard to the questionnaire, I think the record is extremely clear that this matter was reviewed and made available in depth to anyone who cared to investigate it and look at it, and it would be an unfair and inaccurate conclusion that Bob in any way tried to hide that letter or was unwilling to disclose it and discuss it in depth.

Mr. Chairman, I have one additional thought, if I could. It seems to me that the essential ingredients for a good judge are independence, integrity, and hard work. I simply do not know of a better description of Bob Miller.

I suppose one of the things that has been fussed about in this long year process has been that Bob was independent at times. I think he shows the kind of characteristics that a good judge is made of. That kind of personal integrity and kind of willingness to look at the facts seems to me exactly what we want on the bench in our Federal district court and perhaps the other courts around our country.

Thank you.

Senator LEAHY. Thank you very much, Congressman.

Let me ask you: Earlier in the fall, you had sent around to the members of the committee some material relevant to this nomination. Now, I understand you did that with Mr. Miller's consent, is that correct?

Mr. BROWN. I think that was a thought that I had, that a collection of that information might be helpful in correcting some of the misapprehensions and misinformation that had been around. As I recall, that was my idea and I am not sure Bob had a choice in that, but I do think I advised him that we were involved in it and asked for the information.

Senator LEAHY. The reason I ask is that it kind of facilitated things. It put in the public domain some relevant material which had originally been held on a confidential basis which we do to protect the nominee's privacy. When you put it in circulation, I think that it facilitated the consideration of this nomination. I would assume, based on that, that Mr. Miller has no objection to the material being made public.

You are aware of the material, are you not?

Mr. MILLER. Yes, sir.

Senator LEAHY. And you have no objection to it?

Mr. MILLER. No.

Senator LEAHY. Because it tended to move things along, and to that extent you did Mr. Miller a favor. I just wanted to make sure we fully understand, because I may be referring to some of that material during the hearing that is here now.

I appreciate your being here, Congressman, and like Senator Armstrong and Senator Wirth, you also are welcome to stay as long as you like, but we will also well understand if you have to leave.

Mr. BROWN. Thank you, Mr. Chairman.

Senator LEAHY. Thank you very much.

[The statement of Mr. Brown follows:]

Statement by

The Honorable HANK BROWN of Colorado

before the

Senate Committee on the Judiciary

regarding

the Nomination of

ROBERT N. MILLER

to the

United States District Court

for the District of Colorado

November 13, 1987

Mr. Chairman, many thanks for giving me the opportunity to appear before the committee today in behalf of the nomination of Robert N. Miller to the U.S. District Court for Colorado.

Bob Miller and I have know each other personally and professionally for over 16 years. He is an outstanding individual in every sense of the word. He has been an outstanding district attorney, an outstanding U.S. attorney for Colorado for the past six years, and will make an outstanding U.S. District Judge.

His nomination to the Federal Bench has wide, bipartisan support in Colorado from almost every level of the legal and non-legal community.

Rated as qualified by the American Bar Association, Bob Miller has the support of the Colorado Chapter of the Federal Bar Association, the Colorado Chiefs of Police Association, the Colorado District Attorneys' Council, Colorado's two largest daily newspapers -- the Denver Post and the Rocky Mountain News --numerous judges, and attorneys of all political persuasions from throughout the state.

Bob has a variety of legal experience that makes him particularly qualified to be a judge. As an attorney he has handled civil, corporate and criminal law, with the bulk of his experience taking place in the courtroom. He was elected three times as District Attorney from my home county, Weld County, before being nominated as U.S. Attorney for Colorado by President Reagan in 1981.

As U.S. Attorney, Bob developed the first victim-witness program in the nation, a program Congress subsequently mandated in every state. He upgraded the professionalism of the U.S. Attorney's office in Colorado, enhancing its reputation with law enforcement agencies, the courts, the news media and the public.

As a prosecutor, Bob Miller knows about law and order, and he knows about justice and fairness. He has personally tried 19 first-degree murder cases, including the successful prosecution of one of the first known serial murder cases in the nation.

As a matter of fact, Bob coauthored a book on the case, Death Roads, which has been used as the basis for several television programs.

It is my understanding that during the course of its inquiry into this nomination, the Judiciary Committee staff has raised several concerns. Given the importance of the federal judiciary, the Committee is to be commended for a thorough and exhaustive check on every aspect of a nominee's past. I know that Bob Miller is grateful for this hearing today and to have the chance to address all of these concerns.

One of these concerns centers on a letter from former Attorney General William French Smith to Bob Miller about the last in a series of five bid-rigging cases in 1984. The previous four cases had gone to trial with Bob's strong support, resulting in four convictions and seven acquittals. The final case, U.S. v. William G. Lauer and Sterling Paving Co., was the weakest, and opinion within the Justice Department about whether to proceed with it was divided. A decision to go ahead was made in Washington against the advise of the local U.S. attorney, Bob Miller. Bob declined to sign the indictment because he felt it was unprosecutable, as he felt compelled to do by the ABA Code of Professional Responsibility and the Attorney General's Principles of Federal Prosecution.

The case went forward and the Justice Department presented it with staff and logistical support from Bob's office. After the evidence had been presented, the trial judge granted a defense motion for acquittal, something that judge rarely has done. The judge ruled the government had failed to prove its case. Both Denver newspapers praised Bob's decision not to sign the indictment, saying he demonstrated high ethical standards and independent judgment.

The letter from the attorney general regarding the matter came September 28, 1984. There is no question that it is highly critical of Bob, but it also is clear that it was not an official letter of reprimand. Rather, the letter is an administrative rebuke. Had it been an official reprimand, it would have outlined the basis for an appeal. It did not. Nor did the letter suggest any violation of law, regulation or rule.

In filling out the Judiciary Committee's questionnaire, Bob did not disclose the attorney general's letter. But he did not list the letter of commendation "for a job well done" he received from Attorney General Smith just four months later, on Jan. 25, 1985, either.

While the argument could be made that Attorney General letter of rebuke should have been listed on the Committee's questionnaire, the facts are very clear that Bob made no attempt

to hide it. To the contrary, Bob discussed the letter openly and its existence was known to a large number of people before the Judiciary Committee staff raised it as an issue. The list of those individuals is long, but includes Jim Clark, the ABA investgator for the 10th Circuit; William Gavin, then the agent in charge for the FBI in Denver; Senator Tim Wirth's 16-member judicial nomination review committee; Michael Shaheen Jr. at the Department of Justice Office of Professional Responsibility; Thomas E. Dittmeier, U.S. Attorney for the Eastern District of Missouri; and numerous other individuals.

As early as October 1984, Bob was advised by Michael Shaheen of the Office of Professional Responsibility at the Justice Department that the letter would be part of any FBI background check if Miller became a judicial nominee. Knowing the letter would be part of the record, it would have been foolish to try and hide it. While it can be argued that Bob should have listed the letter on the Committee's questionnaire, any reasonable look at the facts shows that he did not try and hide it.

Mr. Chairman, in the many years I have known Bob Miller, he always has been honest, fair-minded, ethical and independent. He has all the the characteristics one would hope for in a judge. I strongly urge the Committee to recommend to the Senate that Bob Miller be confirmed as a U.S. District Judge for Colorado.

Senator LEAHY. Mr. Miller, will you please stand and raise your right hand. Do you solemnly swear that the testimony you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MILLER. I do.

Senator LEAHY. Thank you.

TESTIMONY OF ROBERT N. MILLER, OF COLORADO, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF COLORADO

Senator LEAHY. Did you have an opening statement you wish to make?

Mr. MILLER. Only that I really appreciate the opportunity to be here today. I am looking forward to answering any questions you might have about my qualifications or any concerns that may have arisen. It has been a pleasure working with the members of your staffs on the committee, and I look forward to a prompt conclusion to not only this hearing but this process, and I thank you very much for having me today.

Senator LEAHY. Thank you.

You completed the standard questionnaire that we sent to all the judicial nominees. Question eight of the confidential portion of that questionnaire is the following, and let me just read it for the record. It says, "Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct or been the subject of a complaint to any court, administrative agency, bar association disciplinary committee or other professional group?"

Now, when I went through your responses to that, that question, which is "have you ever been disciplined for unprofessional conduct," I thought that you would respond with reference to the letter of reprimand you received from Attorney General William French Smith on September 28, 1984.

Now, before I go into the question, I want to make it very clear that we are not here in this committee room by these questions trying to determine whether your official actions merited a letter of reprimand. The responsible officials of the Department of Justice apparently reached that decision in September of 1984 and, as near as we can tell, without any dissent.

Our focus is whether you were complete, whether you were candid in responding to the committee's questionnaire. Now, ordinarily a document such as a reprimand would be handled as a confidential matter by this committee. If we asked you questions, we would at least initially do it in closed session. But in this case I understand you stated to us that you widely publicized the fact that you had received this reprimand, and the text of the reprimand was also included in the material circulated by Congressman Brown which I just referred to. We also have a copy of your letter of November 7, 1984, to Michael Shaheen, responding to the reprimand, and both letters will be placed in the record.

[The material referred to follows:]

Office of the Attorney General
Washington, D. C. 20530

September 28, 1984

Honorable Robert N. Miller
United States Attorney
Denver, Colorado 80294

Dear Mr. Miller:

You are hereby reprimanded for your conduct in connection with the recent investigation of Sterling Paving Company and a former officer of the company, William G. Lauer. Your conduct has reflected adversely upon yourself and the Department of Justice and has raised questions as to whether you possess the good judgment required by the position of trust you hold. Your conduct has significantly harmed the ability of this Department to carry out its lawfully constituted responsibilities in the case of Sterling and Lauer.

The specific conduct for which you are reprimanded and the surrounding facts and circumstances are set forth below.

During the past two years, the Antitrust Division, through its San Francisco office, has extensively investigated and prosecuted bid rigging by highway paving firms in Colorado. This program has already led to the conviction of seven corporations and eight individuals, the payment of fines totaling $1,935,000 and the imprisonment of eight individuals.

Recently, the investigation focused on the Sterling Paving Company and a former officer of that company, William G. Lauer. Senior Antitrust Division lawyers, assisted by Colorado Assistant United States Attorney Bruce P. Black, presented evidence to a Denver grand jury concerning bid rigging by Sterling and Lauer. The evidence they collected included statements by a number of witnesses that Sterling had engaged in frequent price fixing on highway construction projects for almost 20 years and that Lauer was the principal actor for Sterling during recent years; testimony by two witnesses about incriminating admissions by Lauer; and testimony by other witnesses who provide corroboration regarding rigged jobs or attempted bid rigging involving Sterling or Lauer.

After assessing the evidence that could be presented at trial, the San Francisco office recommended that Sterling and Lauer be indicted. Their recommendation noted the view of

Mr. Black that he did not believe a jury would convict the defendants, principally because of his judgment that certain witnesses would not be well received by the jury.

After careful study in Washington, the San Francisco staff's recommendation to indict Sterling and Lauer was approved. Since the grand jury was about to expire, on Friday, August 3, Mr. Robert J. Staal, the Antitrust Division's lead staff attorney on the case, called you on the telephone to set up an appointment for the following Monday in order to obtain your signature on the indictment. (It is an established practice in Colorado that the United States Attorney signs all indictments.) The indictment had already been signed by senior Antitrust Division officials, and it was Mr. Staal's intention to present the indictment to the grand jury on August 7. When Mr. Staal arrived at your office on August 6, you advised, for the first time, that you would not sign the indictment, and thus it had to be submitted to the grand jury without your signature.

During the next three days, you had a number of conversations with other Department of Justice officials. J. Paul McGrath, Assistant Attorney General in charge of the Antitrust Division, called you and tried to persuade you to sign the indictment. He emphasized that the Antitrust Division had concluded, after fully assessing the facts and the views of all involved, that the evidence supported the indictment and that in an antitrust case the Division's judgment as to the sufficiency of the evidence ought to prevail. On August 7 and 8 you also talked to William P. Tyson, Director of the Executive Office for United States Attorneys, who urged you to work the matter out with Mr. McGrath to his satisfaction, and you talked to Gary R. Spratling, Acting Chief of the San Francisco office, and Mr. Staal, each of whom reiterated the views expressed by Mr. McGrath. Despite this urging you declined to sign the indictment.

Your failure to sign the indictment was a departure from the long-standing, customary practice in Colorado. This raised a serious concern that prosecution of these defendants on charges of extensive bid rigging activities could be jeopardized if it appeared that you had refused to sign the indictment because of a personal assessment of the evidence that would be admitted at trial. Mr. McGrath spoke with you about this concern, and you advised him that you would do nothing to make your personal views public.

Despite this, on that very afternoon you told a reporter from the Denver Post that you refused to sign the indictment because the case was "unprosecutable." As reported in the Denver Post on August 10, you also criticized the Antitrust Division, stating that "we believe here that you shouldn't bring criminal prosecution against someone unless you're reasonably certain you have

evidence and the testimony to prove your case," whereas the Antitrust Division lawyer in charge of the case "apparently thinks that if you have a questionable case, take it to trial and let the jury decide." You have acknowledged that the reporter accurately quoted your remarks.

At a later meeting with Associate Attorney General D. Lowell Jensen, Mr. McGrath and Mr. Tyson, you acknowledged that you did not act properly in making these statements to the press. Your explanation of your conduct was that it was a flare-up of built-up frustration arising out of the fact that the Antitrust Division on occasion did not follow your advice in bid rigging investigations and prosecutions and the fact that several cases had resulted in acquittal of defendants or voluntary dismissals by the government. You acknowledged, however, that these circumstances did not excuse your public statements.

United States Attorneys are expected to conduct themselves in a manner that meets the very highest standards of the legal profession. As an official of the United States Department of Justice you are expected to follow the direction of the Attorney General and other duly authorized officials of the Department. You are free, of course, to hold opinions and question decisions of other Department officials. However, the public media is not an appropriate forum for discussing such questions as those involved here or for calling attention to any such disagreements. Differences of opinion you may have with an Assistant Attorney General should be brought to the attention of the Associate Attorney General for resolution.

Your actions in this matter cast the Department of Justice in a bad light, undermining public confidence in the integrity of the Department and reflecting adversely upon your professional judgment.

In the future, as United States Attorney for the District of Colorado, you are expected to refrain from conduct such as that described above and to resolve any differences you may have with other officials within the established framework and procedures available to you within the Department.

Very sincerely,

William French Smith
Attorney General

United States Attorney
District of Colorado

1200 Federal Office Building
Drawer 3615
1961 Stout Street
Denver, Colorado 80294

Criminal Division
303/844-2081
FTS/564-2081
Civil Division
303/844-2064
FTS/564-2064
Collections
303/844-5938
FTS/564-5938

November 7, 1984

Michael E. Shaheen, Jr., Counsel
Office of Professional Responsibility
Department of Justice
Room 4306, Main Justice Building
Washington, D.C. 20530

Dear Mike:

As we discussed on the phone on November 6, 1984, the Attorney General and Associate Attorney General were kind enough to personally discuss the matter of the letter of reprimand with me last Wednesday in Washington.

They indicated that this letter was not intended to be placed in my permanent personnel file or disseminated beyond the immediate parties. I told them I had discovered that there was a copy of the letter in your files. I was concerned that this letter could hamper my future professional career. They said it should not and that was not their intent.

You suggested that under these circumstances I should provide a response for the record. My comments are set forth below. Please see that this response is placed with the letter of reprimand wherever it is filed.

The letter of reprimand reflects an intense concern for public confidence in the integrity of the Department. I too am deeply concerned with the public image of the Department, because the media and the judges of our district and circuit benches hold me vicariously responsible for the conduct of all Departmental attorneys who practice here, even though I have no direct control beyond my own staff.

I recognized the problems of the Department attorneys in our district one year ago and, in an effort to resolve this problem within the established framework, I wrote the Advisory Committee of U.S. Attorneys, asking for advice and guidance (copy attached). I received no response.

During my tenure, the only major controversies in this district have involved cases conducted by Department attorneys, including the Antitrust Division. Each has resulted in undeserved personal embarrassment for me. The Tax Division's Kilpatrick case, which immediately preceded these Antitrust cases, created a tremendous nationwide controversy. At the request of the Department, I consented to an interview by Mike Wallace of 60 Minutes, even though my office played no significant role in the case. Incidentally, I refused to sign the pleading in that case which sought to enjoin publication and to excise the prosecutors' names from the scathing court opinion, because in my judgment we were far afield from the issue of guilt or innocence of the defendants and this unique request would backfire. That pleading, in fact, triggered nationwide adverse publicity against the Department.

The Antitrust Division has obtained a number of significant convictions by guilty plea in this district. The Division's record at trial, however, is not as impressive. In four trials, seven out of eleven defendants were acquitted. In two additional cases, the Division was forced to dismiss all charges on its own motion because the cases fell apart between indictment and trial. These losses were the subjects of criticism from the judges, press and public directed at me, personally. The feeling was that I should have been able to prevent these losses from occuring.

Based upon my review of the evidence, I expected two more acquittals in the Sterling and Lauer cases. I therefore felt ethically bound to recommend against prosecution, as did at least one staff attorney of the Antitrust Division. The Principles of Federal Prosecution direct that prosecution should not be initiated unless the prosecutor believes that a conviction is probable (Page 6). The prosecutor's belief in the guilt of the accused is irrelevant. This philosophy has guided me in my career as a prosecutor for thirteen years, and was the basis for my decision to recommend against this indictment.

I was informed that my dissent would probably result in the case being "killed" in spite of the staff recommendation to proceed. Yet, no one in the chain of command inquired as to my reasons or whether I would sign the indictment. In fact, no one asked if I would sign the indictment until it was presented to me by Mr. Staal on that Monday morning. In my view , my signature on an indictment must necessarily mean that I concur in the filing of the charges and that a conviction is likely. In such matters, I do not believe my signature can be provided merely as a matter of tradition, custom or comity.

Mr. McGrath attempted to persuade me to sign the indictment. I explained my ethical position to him, pointing out the mandate of the Principles of Federal Prosecution. He urged me to sign the indictment, saying that since I believed they were guilty, why not "let the jury decide." I felt this position was in violation of the Principles of Federal Prosecution.

On August 7, 1984 the indictment was returned without my signature. The magistrate refused to accept it in open court on the record because a member of the U.S. Attorney's Office had not signed it. He stated that his reason was due to troubles in the District from the actions of "attorneys from outside." I learned later that this was his euphemism for the Antitrust Division lawyers. The magistrate later changed his mind and informed me that he would accept the indictment. I related this to the Antitrust Division attorneys and suggested they proceed if they so desired.

Mr. Staal was very concerned that my refusal to sign the indictment would leak out. I reminded him, and he quickly realized, that public awareness of my refusal to sign was inevitable, because it had already come out in open court and on the record at the time of the first presentment of the indictment. Mr. Staal then told me that he would recommend the indictment not be returned. He felt that my dissent from the case would result in judicial hostility that would make the case unwinnable. Later, after reviewing the case for the first time, Mr. McGrath told me that he would not have authorized prosecution (in part because of my position), but since the indictment had been returned and rejected, he felt compelled to proceed, rather than move to dismiss. I told him that since the indictment had been rejected, a motion to dismiss was unnecessary. Nevertheless, the indictment was returned, even though both Mr. McGrath and Mr. Staal apparently then believed the case should not go forward.

Mr. McGrath asked me not to make my position public. I told him it was already public, because of the public presentment proceeding and because one of the defense attorneys was already aware of it. I told him "the walls in the courthouse have ears," that the reporters assigned to the courts talk to the judges and court personnel and that they all probably knew already. I told him I would not lie to the courts or to the press about it, but I would not issue a press release, hold a press conference or otherwise encourage dissemination of my position. I had no reason to make my rather uncomfortable position known to the public.

Immediately after the return of the indictment, on August 9, 1984, John Toohey, an experienced and highly respected reporter assigned to the courts for the Denver Post, came to my office as he does about once a week. He said he had confidential information from courthouse sources that I would not sign the indictment because I felt the trial attorneys for the Antitrust Division were incompetent; that many of the key witnesses had been given deals for their testimony and did not have to testify and that the remainder of our witnesses were not good. I considered his litany of specific reasons as extremely critical of the Antitrust Division and its attorneys, and very damaging to our case. I also knew that this would be the story in the paper if I offered the standard "no comment" as I had initially intended to do. So in a matter of seconds I decided to say, "No, John, let's just say I believe the case is unprosecutable." I chose to explain my actions to Mr. Toohey by using rather broad and ambiguous terms to avoid the public appearance of a converup that would result from a "no comment" and to prevent the damage to the public confidence in the integrity of the Antitrust Division that would have resulted if the Post had run the article with the specific reasons the reporter had related to me.

Perhaps my choice of words was poor, but in my view it was inevitable that this controversy was going to be printed by the Post and it was going to be specifically unfavorable to the Department and our case. I appreciate how some might interpret my words as an attack on the Antitrust Division, but the truth is that I made an on-the-spot decision to try to cut the losses on a story ready to run. I tried to control damage already done. I do not believe my response dramatically affected public perception of the Department. This was not a big news story. This was not a big case. The company involved is a small company in a small Colorado town. In fact, this was the last case in the entire series of cases presented by the Antitrust Division, the biggest and most publicized cases were disposed of months before.

When I became U.S. Attorney I took over an office that was held in low regard by the courts, agencies, bar and the media. I am proud of my record and I invite you to inquire of any of the courts, agencies, attorneys or news media about the present state of public confidence in the U.S. Attorney's Office in Colorado. I invite you to inquire about the impact of my

office on the conduct of Department litigation in this district, and in particular on my professional judgment. I am confident you will find universal support for my professional judgment as exercised repeatedly in many, many cases.

Thank you for attending to this problem for me.

Very truly yours,

ROBERT N. MILLER
United States Attorney

RNM:hp

Senator LEAHY. I will let you give whatever answer you like to the question of why you did not disclose the reprimand on your confidential questionnaire. But I see two possible answers. One may be that you do not consider this letter of reprimand reflected disciplinary action by the Attorney General, or, secondly, you may take the position that the discipline was administered for reason other than unprofessional conduct.

Do you believe that this letter of reprimand was not a disciplinary action?

Mr. MILLER. I did not believe that it was, no, sir.

Senator LEAHY. Why?

Mr. MILLER. Well, my real reason was that I thought it was an administrative rebuke that had been the result of some internal Department of Justice politics and it ended up in a rebuke to me because I did not sign the indictment and I said that the case was not prosecutable, so I really did not think it was discipline.

You know, in looking back, I possibly was wrong on that, but I really do not think that it was a discipline and I still do not.

Senator LEAHY. Well, do you think that the conduct addressed in the letter of reprimand does not amount to unprofessional conduct?

Mr. MILLER. No, I did not. I thought that it was that I did not sign the indictment which, if I had gone ahead and signed it and been here today, I think that would have been unprofessional conduct.

Senator LEAHY. Well, you said in your letter to Senator Thurmond, "I have never viewed the Attorney General's letter as an official reprimand, because it was personally addressed to me in the same manner as are most personal letters. The letter did not say it was an official reprimand, it was not in memorandum form."

Let us go down a little bit—it was addressed, "The Honorable Robert N. Miller, United States Attorney, Denver, Colorado 80294." Is that the way most of your personal mail is addressed?

Mr. MILLER. No. Actually, what happened was it was delivered to me at my home.

Senator LEAHY. In fact, somebody came out from the Justice Department, flew out to Colorado and hand delivered it, did they not?

Mr. MILLER. Yes, they did, at my city of residence.

Senator LEAHY. And you said the letter does not use the term "official reprimand," but here is what it says in the opening paragraph, and I will just read it:

> You are hereby reprimanded for your conduct in connection with the recent investigation of Sterling Paving Company and a former officer of the company, William G. Lauer. Your conduct has reflected adversely upon yourself and the Department of Justice and has raised questions as to whether you possess the good judgment required by the position of trust you hold. Your conduct has significantly harmed the ability of this Department to carry out its lawfully constituted responsibilities in the case of Sterling and Lauer.

And the next to the last paragraph reads as follows:

> Your actions in this matter cast the Department of Justice in a bad light, undermining public confidence in the integrity of the Department and reflecting adversely upon your professional judgment.

Now, this is not the sort of chatty bread-and-butter letter one gets back and forth.

Mr. MILLER. No.

Senator LEAHY. Maybe you practice law differently than where I come from and maybe technically, if it does not say "this is an official reprimand," it may not be, but how does the average person read that any other way than as a reprimand?

Mr. MILLER. Well, I thought I was reprimanded, but I did not think it was an official reprimand in the sense that I had any due process rights to contest it or that my views were going to be heard on it, and then subsequently, Senator, when I talked to the Attorney General about it and he told me that it was nothing to worry about and that it was just between us and that it would not in any way interfere with my future career, including this position, which was even then open, and then, of course, later when the case was finally dismissed by the judge, for many of the reasons that I had refused to go forward with, I simply thought it became a non-issue at that time because it turns out that the case turned out the way I predicted it would turn out, the judge ruled that way, and then this questionnaire comes along and I really had believed that this thing was something totally behind me.

I had also, of course, shared it with a good many people and I had talked to Mike Shaheen at my retreat in October, which was just a matter of days after I received this letter, and he informed me that these things perhaps end up in his office and he would check on this and he did at a later date and told me, that is why I sent the response to him, because he told me it was there. He further told me that if I would ever come to this position for any nomination to this post, that those records in his office would be checked, and so I knew that that would come up.

If I am wrong——

Senator LEAHY. So, does that not still split hairs over the questionnaire that we sent you? Attorney General Smith said your actions reflected adversely upon your professional judgment, and raised questions about whether you possessed good judgment. Does that not at least raise a question, when you look at that questionnaire, which asks has anybody ever accused you of unprofessional conduct? Do you not think that you could have said, "Yeah, here is a letter I got from the Attorney General, and here is my response, you know, I think he is full of baloney on this thing, but I got it."?

Mr. MILLER. My state of mind then was that you did have both that letter and my response, because it would have been picked up in the routine check of OPR. Furthermore, you know, shortly after I got this letter, I did get a letter commending me for an action in the discharge of my duties by the Attorney General and I just thought that when we got down to this point that this thing had really resolved itself, the case was over, the Department of Justice went forward with the case, the case was lost and it was lost on a motion for judgment of acquittal which in our jurisdiction is a rare, rare occasion.

So, with that, I had been reprimanded I guess for being right and it did not seem to me that that is a negative in the scheme of things as I looked at them.

Senator LEAHY. Well, the reprimand goes to two points.

Mr. MILLER. That is right.

Senator LEAHY. First, your refusal to sign the indictment prepared by the Antitrust Division. I understand they were pretty con-

cerned that they heard you were not going to sign it after somebody came out there. I believe Mr. Staal or somebody came out there to get it signed.

Let me talk about the second point. Reading from the letter: "Mr. McGrath"—who was Assistant Attorney General for Antitrust—"spoke with you about this concern, and you advised him that you would do nothing to make your personal views public.

"Despite this, on that very afternoon, you told a reporter from the Denver Post that you refused to sign the indictment because the case was 'unprosecutable.' "

Now, Attorney General Smith also notes: "United States Attorneys are expected to conduct themselves in a manner that meets the very highest standards of the legal profession. While you, as a U.S. attorney, are free to disagree with Justice Department decisions, the public media is not an appropriate forum for discussing such questions as those involved here or for calling attention to any such disagreements."

What about that?

Mr. MILLER. Well, that is not exactly accurate. I did tell Paul McGrath that I would not go to the press and I did not go to the press. I did tell him further, however, and I stated there, that the press already knew about this action or non-action on my part, because it had been returned in open court, in the magistrate's court the day before, so it was public record, it was already known and I told him I would not go to the press, but I also told him that I would not lie to anybody about it and, if asked, I would have to say something.

Maybe it was a poor choice of words in saying that, but when the Denver Post reporter confronted with me, he had some rather critical things to say, not only about the case but about the Department, and I thought in an instant the way to diffuse that was to say no, that I just felt the case was not prosecutable.

I really felt that I was doing damage control at that point.

Senator LEAHY. Well, let us go to the notebook material that Congressman Brown put in, and I understand that you stand by the material in the notebook, there is nothing in there that you disagree with. Is that correct?

Mr. MILLER. Well, there are a couple of corrections, but basically I agree with it, yes.

Senator LEAHY. Let us go to a few things in the chronology that appears in this material, which I will place in the record.

[Chronology follows:]

ROBERT N. MILLER CHRONOLOGY

December 7, 1981	Sworn in as United States Attorney.
April, 1982	Administrative Officer took sick leave and did not return to work.
August, 1982	Frank Hall temporarily became Administrative Officer.
October 24, 1982	Frank Hall and Bill Wooden permanently hired as Administrative Officer and Assistant.
April 29, 1983	Speech to Auditors on expert witnesses. Drove Mercedes.
July 27, 1983	1974 Mercedes forfeited by Court order to Rocky Mountain Drug Task Force, which Miller heads.
August, 1983 to April, 1984	Four Anti-trust trials, using many of the same witnesses to be used in Sterling and Lauer case, resulted in acquittals for 7 of 11 defendants.
August 31, 1983	Speech to Rotary at I-70 & Chambers Road on drugs. Drove Mercedes.
September, 1983	Tax Division tries to appeal and mandamus Judge Winner to try to block West publication of Winner's Kilpatrick opinion, in which Judge Winner sharply criticizes Tax Division personnel. Miller refused to sign motions.
October 21, 1983	University of Northern Colorado speech on "Politics and the Law" for Taft Institute. Drove Mercedes.
November 4, 1983	Gave Moyer a check for $464.48 for trip to Hawaii at Thanksgiving.
Late November, 1983	Could not go to Hawaii - told Moyer. He agreed to get tickets instead for San Diego.
End of November, 1983	Moyer transferred to Indiana.
December 3, 1983	Miller's check to Moyer cleared bank.
January, 1984	Miller was informed that Moyer under investigation - recused his office.

February 28, 1984	Mike Wallace/60 Minutes interview re Kilpatrick. Wallace challenges Miller for signing Kilpatrick indictment.
March, 1984	Miller received tickets in mail from Moyer.
June 12, 1984	Memo recommending against Sterling and Lauer indictment.
August 6, 1984	Refused to sign Anti-Trust indictment of Sterling and Lauer. Refusal based on ethical requirements of Department of Justice's Principles of Federal Prosecution.
August 7, 1984	Indictment returned and Magistrate refused to accept it without Miller's signature.
August 9, 1984	Paul McGrath ordered indictment returned. Toohey contacted Miller about why Miller's signature not on the indictment. He said he had sources who said Miller did not sign because the Anti-Trust attorneys were incompetent, they had given too many immunities and the witnesses were weak. Instead of saying "no comment", Miller decided to deflect the damage that story would do to the Department by saying, "No, it is unprosecutable."
September 28, 1984	Received Attorney General's letter.
October, 1984	Mike Shaheen, OPR Director, spoke at U.S. Attorney's office retreat in Colorado. Miller asked him about Attorney General's letter. He said he would check and see if he had a copy of it at his office. He also told Miller that his office is contacted by the FBI on judicial nominees and that any entries OPR has become part of the file that goes to the Senate Judiciary Committee. He further said DOJ employee nominees average about two contacts with his office that are sent forward with the FBI to the Judiciary Committee.
Later in October, 1984	Shaheen and Miller talk on the phone. He confirmed he had a copy of the Attorney General's letter.

Early November, 1984	Miller meets with Attorney General William French Smith and Associate Attorney General Lowell Jensen and they assure Miller not to worry about the letter; that it is just between them, that it will not be in his permanent file and will not interfere with his professional career, including selection to a judgeship.
November 4, 1984	Miller sends his response to the Attorney General's letter to Mike Shaheen, Counsel, Office of Professional Responsibility.
October, 1985	Miller advised OPR wanted to talk to him abut Moyer matters.
January, 1986	OPR attorneys interviewed Miller about Moyer matters.
July 28, 1986	Mike Shaheen advised Miller that OPR's inquiry into the Moyer matter found no improper conduct. Matter closed on September 5, 1986.

Senator LEAHY. Your entry for August 6, 1984, reads as follows: "You refused to sign an antitrust indictment of Sterling and Lauer, refusal based on ethical requirements of Justice Department Principles of Federal Prosecution," which basically is the position you take, is that correct?

Mr. MILLER. I am sorry, I did not hear what——

Senator LEAHY. Your entry of August 6, 1984, reads as follows: "Refused to sign antitrust indictment of Sterling and Lauer, refusal based on ethical requirements of Department of Justice Principles of Federal Prosecution." That is in the chronology section of the notebook.

Mr. MILLER. Is it the first, is it the tab on——

Senator LEAHY. Actually, I have torn mine apart, I do not have it in the form you have. It is the last part, the chronology part.

Mr. MILLER. Yes. Okay.

Senator LEAHY. Now, Attorney General Smith, in writing about the events of August 6th, says, "Since the grand jury was about to expire, on Friday, August 3, Mr. Robert J. Staal, the Antitrust Division's lead staff attorney on the case, called you on the telephone to set up an appointment for the following Monday in order to obtain your signature on the indictment. . . . When Mr. Staal arrived at your office on August 6, you advised for the first time that you would not sign the indictment." Is that correct? Is it correct that the first time you told him you were not going to sign it, was the day before it was to be presented to the grand jury?

Mr. MILLER. Well, I had written—well, I am not sure I actually signed the memo, but we had sent a memo, Bruce Black, my assistant, who was in charge of the liaison in this matter and had formerly been with the Antitrust Division, we had talked about a whole series of cases, this was kind of the last case, but we talked about them and we had sent a memo back in June, I believe, Senator, saying that we did not think this case ought to go forward and all of the reasons why. So, we did not specifically say at that time, however, that we would not sign the indictment, but we were recommending against indictment at that time, so it should not have been any surprise that we were against it.

Senator LEAHY. But you never told him you were not going to sign it before Mr. Staal got there? You did not tell anybody you were going to refuse to sign it?

Mr. MILLER. In fact, I did not know it was going to be presented at all. I was waiting on some kind of dialogue to arise out of my memorandum of June, and I never heard anything, and so it was quite a surprise to me when they arrive on the scene and present me an indictment, I think 2 days before the grand jury was going to expire, and so it was at that time that I said that I could not sign it and we began discussion of what to do next.

Senator LEAHY. In the next entry in that chronology, September 28, 1984, the date of the letter of reprimand, did that come as a bolt out of the blue?

Mr. MILLER. Yes, it did.

Senator LEAHY. That was September 28th. On August 27, 1984, you were at a meeting in Washington, with high-ranking Justice Department officials to discuss your refusal to sign the indictment and your comments to the press on the topic. Is that correct?

Mr. MILLER. I am sorry, I did not hear your question.

Senator LEAHY. In August, about a month before the letter, did you not attend a meeting in Washington, on August 27th, with a number of high-ranking Justice officials there, to discuss your refusal to sign the Sterling and Lauer indictment?

Mr. MILLER. I did come back and talk to Lowell Jensen and Paul McGrath about it, but I do not recall the exact date.

Senator LEAHY. But that was before the letter of——

Mr. MILLER. Yes.

Senator LEAHY. And did you also at that time get into a discussion of your comments to the press?

Mr. MILLER. Did I get into a discussion about what?

Senator LEAHY. Your comments to the press.

Mr. MILLER. We did have some discussion about that, yes, sir.

Senator LEAHY. Were they eagerly supportive or would you describe it otherwise?

Mr. MILLER. I would describe it—well, it depends on how you——

Senator LEAHY. Well, you describe it how you would like. How would you describe it?

Mr. MILLER. Frankly, Lowell Jensen I thought or my impression of what he was telling me was that, "Hey, let's go back, we're on the same team, let's get going," and that was it. Paul McGrath was very upset about it still.

Senator LEAHY. Was there discussion of a reprimand at that time?

Mr. MILLER. No.

Senator LEAHY. Did you characterize the remarks to the press one way or the other at that meeting——

Mr. MILLER. I think it——

Senator LEAHY [continuing]. As proper or improper?

Mr. MILLER. No. I think I said about what I said a while ago, I maybe could have used better words, but I did not.

Senator LEAHY. Tell me as much about that meeting as you remember.

Mr. MILLER. I really do not remember a whole lot. I remember we went into Lowell Jensen's office, and my understanding was that it was going to be Lowell Jensen and I and Paul McGrath came and my understanding was that he had found out about the meeting and was not invited, but that was only my understanding.

Lowell began discussing the matters and asked me what I had to say about it, and I said much of what I think I have said here, and Paul McGrath was asking about the same and we had a discussion, an interchange I guess, and, as I said, Lowell was—my impression of that whole role was peacemaker, and that is what I thought we had done, was make peace, and I left and came back to Colorado thinking really that——

Senator LEAHY. Why did you not list that meeting in your chronology?

Mr. MILLER. You know, I had forgotten about the meeting until you brought it up.

Senator LEAHY. Apparently, as near as I can tell, the Justice Department had no disagreement about the letter of reprimand. In fact they even cleared it with the White House. Did you get that same impression?

Mr. MILLER. No, I did not. I did not know anything except one Saturday I picked up this letter that was delivered to me by Bill Tyson, and that was a bolt out of the blue.

Senator LEAHY. Your chronology says that in early November 1984 you met—well, let me just read what it says: "Miller meets with Attorney General Smith and Associate Attorney General Jensen, and they assure Miller not to worry about the letter, it is just between them, it will not be in his permanent file and will not interfere with his professional career, including selection to a judgeship."

I have asked the Justice Department for any information they might have—and we have had a very difficult time getting material—on this meeting. They do not have any, or at least they have not given us any information on that meeting. Do you want to tell me more about the meeting?

Mr. MILLER. I called, after I had talked to Mike Sheehan, and found out there indeed was a copy of the letter in his file, I called Lowell Jensen and asked him, I was very disturbed about this letter and that I would like to talk to the Attorney General about it and would he set up a meeting to do that, and he said he would.

I came back and we went into the Attorney General's office and he was very cordial, it was fairly informal, and we chit chatted for a while and finally I said I am very concerned about this letter, and we talked in general terms and he was again very soothing and placating as far as I was concerned, and essentially said what I have said in that chronology and also had said in my response that I wrote shortly after I got back from that meeting, because I was concerned that, when he told me it was not going to be part of my permanent file, I said, "But, Attorney General, Mike Shaheen tells me that there is a copy floating around in his office now." He did not seem to respond to that, so when I got back I called Mike Shaheen and I told him that and he said, well, maybe he really did not know that that was the route of the paper flow, and I told Mike Shaheen the essential ingredients of that conversation and he said, "Well, why don't you write me a memo to that effect, or a letter, because you've never yet got to respond to this thing," and I wanted to do that and so I did it, and I am glad I did at this point.

Senator LEAHY. Well, we will ask the Justice Department again to see if we can get some of that, get any material from that meeting. You said it was in November of 1984 in your chronology. You do not have the exact date?

Mr. MILLER. I do not have the date. My response——

Senator LEAHY. Tell me again who was at the meeting and maybe that would make it easier, we can go back to their logs.

Mr. MILLER. At the Attorney General's office?

Senator LEAHY. Yes.

Mr. MILLER. Lowell Jensen and myself.

Senator LEAHY. And the Attorney General?

Mr. MILLER. And the Attorney General.

Senator LEAHY. Okay.

Mr. MILLER. The only way I can deduct is my response letter I think says—it is dated like November 6th, and it said, "I visited with the Attorney General the preceding Wednesday," or some

such thing, so if we had a calendar we could probably derive the date that way.

Senator LEAHY. On October 13th of this year, the FBI interviewed you concerning your connection, if any, with the defendants in the antitrust case in which you refused to sign the indictment. Is that the first time the FBI asked you about this question?

Mr. MILLER. That question?

Senator LEAHY. Yes.

Mr. MILLER. Yes.

Senator LEAHY. Did you have any connection with the defendants in this case.

Mr. MILLER. No.

Senator LEAHY. When you were in private practice in Fort Collins, did your firm represent Flat Iron Paving Company?

Mr. MILLER. I do not recall whether they did or not, to tell you the truth.

Senator LEAHY. Had you recused yourself from participation in the criminal antitrust cases against Flat Iron and its officers that were prosecuted before the Sterling and Lauer case?

Mr. MILLER. I had recused myself from two defendants. One was Carl Hill, of Bestway Paving, and another I believe was Dick Roper, from Cowan Concrete. I had recused myself from those cases because I did know those people, they were from my home town in Greeley and they ended up pleading guilty and going to Federal prison.

Senator LEAHY. And that is why you recused yourself.

Mr. MILLER. Yes.

Senator LEAHY. In the indictment against Sterling Paving Company and William Lauer, conspiracy was charged. Was Flat Iron Paving Company an unindicted member of this alleged conspiracy?

Mr. MILLER. Yes.

Senator LEAHY. Did some former members of Flat Iron testify for the government in the prosecution against Sterling and Lauer?

Mr. MILLER. Yes.

Senator LEAHY. Would you have felt that your reasons to recuse yourself from the first case because of the testimony of some of those people in the second case, did that rise to an area where you considered whether you should recuse yourself from the Sterling and Lauer case? Did you feel that it was enough of a connection?

Mr. MILLER. I really did not. I really did not.

Senator LEAHY. Apparently, there was a John Toohey, of the Denver Post, to whom you commented that the Sterling and Lauer case was unprosecutable. Did you also discuss with him information about your conversation with Assistant Attorney General McGrath about this case?

Mr. MILLER. Did I discuss with John Toohey my conversation with him?

Senator LEAHY. Yes.

Mr. MILLER. I do not recall that I did that, no, sir.

Senator LEAHY. Did you tell anybody that you thought that the San Francisco Office of the Antitrust Division was weak in its quality?

Mr. MILLER. I think I probably did within my office.

Senator LEAHY. Let us go to another area. Mr. Miller, in 1986, the Justice Department's Office of Professional Responsibility, OPR, had you as the subject of their inquiry and, I should state right off the bat that OPR ultimately concluded that there was no improper conduct on your part. One of the allegations concerned your use of a Mercedes-Benz automobile that had been seized or forfeited in a drug investigation. What was that all about?

Mr. MILLER. Well, the car, my recollection is, was not seized in a drug case. I think it was a Customs car originally and was forfeited by court order and, as far as I know, what it was all about was during the course of the investigation of Jim Moyer, who was the acting U.S. marshal, when I became U.S. attorney, who later left our jurisdiction and was under investigation apparently as a result of that information, it was developed that I did indeed use the car and I did.

Senator LEAHY. How often did you use it?

Mr. MILLER. I can only honestly recall being in that car three times. It was forfeited to the government by court order and I recall shortly after that—I live in Greeley, Colorado, which is 60 miles from Denver, and at the time I was car-pooling with three other people, and we came down to Denver and I recall that I had to give a speech, and I think ironically it was on drugs, at the Rotary Club in Aurora or something like that, and I did not have a way to get there and the car was in the basement and I drove it out there. I think I drove it to another speech on testimony by auditors, is my recollection, and then I believe I drove it to Greeley once and I talked to the University of Northern Colorado, Taft Institute, because I had come down to work and then I had to go back up, is my recollection.

Senator LEAHY. That was the Mercedes-Benz?

Mr. MILLER. 1974 Mercedes-Benz.

Senator LEAHY. Did you keep the keys for that or were the keys kept with the——

Mr. MILLER. I did not have the keys. I do not know where they were. I think the Drug Task Force office had them, and then I think the Marshals Office had them.

Senator LEAHY. Now, did you ever have any other car in your possession for your use that had been seized by either DEA or Customs?

Mr. MILLER. Not that I recall.

Senator LEAHY. You did not have any other seized or confiscated car that you used regularly for commuting between Denver and Greeley or anywhere else?

Mr. MILLER. No.

Senator LEAHY. As U.S. attorney, have you had any car, official car or anything of the sort assigned to you?

Mr. MILLER. I have not. I think the DEA, when I first started, had a car that I used occasionally, but that was just for a very brief period of time, and then I have never had a car assigned to me.

Senator LEAHY. That was besides the Mercedes?

Mr. MILLER. Yes.

Senator LEAHY. Was that a seized car or——

Mr. MILLER. I thought it was just a DEA car.

Senator LEAHY. Did you use that often?

Mr. MILLER. I do not recall using it very often.

Senator LEAHY. Now, you had not mentioned the OPR inquiry in response to our questionnaire, is that correct?

Mr. MILLER. That is correct.

Senator LEAHY. And why was that?

Mr. MILLER. Well, I honestly did not see where it was responsive to the question. I just did not see a question that honestly called for it and since there was a finding of no improper conduct, I did not see how it was very negative.

Senator LEAHY. We have had questions regarding your application for a VA mortgage. You made application for a VA loan in May 1970 in order to purchase a four-unit property located 411–417 Thunderbird Plaza, in Fort Collins, is that correct?

Mr. MILLER. Yes.

Senator LEAHY. And you were living at that time at 1937 Country Club Road, in Fort Collins?

Mr. MILLER. I do not remember.

Senator LEAHY. You were not living on Thunderbird Plaza?

Mr. MILLER. No.

Senator LEAHY. The standard VA loan application includes a certification that you intended to use the property being purchased, in this case a four-plex, as your personal residence, is that correct?

Mr. MILLER. I am sorry, I could not——

Senator LEAHY. Well, when you buy this four-plex on Thunderbird, one of the conditions of the VA loan is that your personal primary residence be there, and there is a certification to that effect. Do you recall signing that?

Mr. MILLER. Yes.

Senator LEAHY. But you did not move into the property on Thunderbird Plaza and use it as your personal residence?

Mr. MILLER. No, I did not.

Senator LEAHY. What happened? You had applied for it on that basis, but you did not move in. How come?

Mr. MILLER. Well, what happened was that my wife, who had just gotten a job in the Fort Collins school system, at Lasher Junior High, which was in this area, we looked around and we found this place, it was not completed and it was not going to be until late summer or early fall, and we were going to live in one of the front units, is my recollection, we were getting ready to move in, we closed the loan I think in August or September, and I think they were done at that time and just had been done, and some people came to see me about being district attorney in the adjoining county where Greeley is located, and I began that process. I think I ended up being interviewed by Governor Love at that time, very shortly after this whole event, and these people came to see me I think very shortly after this closing, and my whole life changed its course and I ended up moving to Greeley and selling everything I had in Fort Collins.

Senator LEAHY. Greeley, that is over in Weld County, is that?

Mr. MILLER. Yes, that is right.

Senator LEAHY. And how many units in the four-plex were rented then?

Mr. MILLER. I do not recall. I have no idea how many were rented.

Senator LEAHY. Did you have a time when they were all rented, do you recall?

Mr. MILLER. I just do not know.

Senator LEAHY. When did you sell the four-plex?

Mr. MILLER. I think it was February.

Senator LEAHY. Of 1971?

Mr. MILLER. Yes, right after I—it was a month after I started being DA in Weld County.

Senator LEAHY. And the Country Club Road property, approximately when did you sell that, in relation to the fourplex; before or after?

Mr. MILLER. It would be after, it was a few months after, several months after.

Senator LEAHY. Half a year or a year?

Mr. MILLER. Well, I think we did not get it sold until after Diane finished teaching, but we had been trying to sell it through out that period of time.

Senator LEAHY. Had you already moved to Weld County at that point?

Mr. MILLER. Well, I was living over there and trying to sort of commute. I had to be living there and I was living with friends and making do in Weld County.

Senator LEAHY. So, what you did was you lived in the house on Country Club Road until you went to Weld County, is that correct?

Mr. MILLER. Yes.

Senator LEAHY. You sent a letter to the Poudre Valley National Bank, on May 26, 1970, in which you say, "To whom it may concern: My house is on the market to be sold." I assume that refers to the County Club Road property. Why was that letter sent?

Mr. MILLER. I do not have any idea. I do not recall that at all.

Senator LEAHY. Okay. Did you list it with a realtor at that time, do you recall?

Mr. MILLER. At what time?

Senator LEAHY. May of 1970, when you sent the letter to the bank.

Mr. MILLER. No, I do not recall whether I did. I do not believe I did. I believe the same realtor from whom I got the four-plex, who was in my office building, I discussed about selling my house, he was checking on it and we were talking about listing it, I believe, and then I was going to try to sell it, too, and as I said, then my whole life veered in another direction and I simply forgot about that whole process.

Senator LEAHY. Did you get a VA loan on your new house in Greeley?

Mr. MILLER. No.

Senator LEAHY. Did you try to get one?

Mr. MILLER. No.

Senator LEAHY. Well, the reason I asked is that you sent a letter to the VA in April of 1971, in which you say, "Governor Love appointed me as District Attorney of the 19th Judicial District, here in Greeley. I was previously living in Fort Collins, Colorado, and this appointment has necessitated me moving to Greeley, Colorado. Upon this appointment, I sold my four-plex which was used as a residence and which had a VA guaranteed loan on it. I was told by

the VA office in Fort Collins and other people that a veteran with a VA loan on his home could sell his home and allow the buyer to assume the loan and be entitled to another VA loan in the town to which he moved because of his job."

And then you say, "I called the Denver Regional Office to verify this for financing on my new home which I will be building in Greeley. Much to my dismay, I found that their opinion was that I could not have another VA loan simply because I moved because of my job. This is not what I was led to believe and I do not believe it is fair. I was told that this regulation did allow under circumstances such as this that a person could have a new entitlement when moved because of their job. I would like to know the authority upon which the Denver office can reject applications of reentitlement for a VA loan."

But you had not used the four-plex as a residence?

Mr. MILLER. I had not actually lived there, but that was certainly the intent when we purchased it and I did not—although I did move some things in, I never actually physically lived there.

Senator LEAHY. Even though you reported it as your home, it really was not your home?

Mr. MILLER. It really was not my home in the sense that I actually was living there at that time, I guess.

Senator LEAHY. Now, the committee staff has talked to you and expressed an interest in this VA loan, had they not, the Judiciary Committee staff?

Mr. MILLER. Yes.

Senator LEAHY. Did they just call you or what?

Mr. MILLER. I am sorry?

Senator LEAHY. Did the committee staff just call you up and say what about this? How did this all come about?

Mr. MILLER. I think Mr. Tartaglino called me and asked me about any real estate that I had owned, and I gave him a listing and, frankly, had forgotten that I had this one and I called him back and gave him this one, but I think that was the context in which it arose.

Senator LEAHY. I understand that Senator Thurmond has some questions. We are looking over some of Senator Thurmond's questions which I will submit for the record, but there are a couple he wants to get on the record now and I will ask those.

Let me make sure I fully understand this November 1984 meeting with Attorney General Smith. Is it your testimony that Mr. Smith took back the reprimand, is that basically it? I do not mean to put words in your mouth. I am just trying to——

Mr. MILLER. No, I do not think that was it in my mind. However, the sting of the letter was entirely gone and when I left I thought that it simply was not as serious as I thought it was because of his comments, so it was not a matter of him taking it back in that sense. In fact, I had thought about asking him to take it back when I went and that was my first personal conversation with the Attorney General. And, much like this, it is an intimidating experience, and I felt that when we had this discussion and he told me what he did, that I really did not have to ask him to take it back because, in effect, the seriousness of it was all gone.

Senator LEAHY. Did you ever write to him about the meeting?

Mr. MILLER. Only the letter that I sent to Mike Shaheen, which was in response——

Senator LEAHY. You did not write to the Attorney General and say thanks for the meeting or——

Mr. MILLER. I do not know. I might have, but I do not recall that.

Senator LEAHY. Did you make any contemporaneous notes of that meeting?

Mr. MILLER. No.

Senator LEAHY. Now, you must have had some kind of appointment for the meeting, did you not?

Mr. MILLER. Yes.

Senator LEAHY. Do you remember who you made that appointment with?

Mr. MILLER. I called Jensen and he set up the appointment.

Senator LEAHY. And did you come to Washington specifically just for that meeting?

Mr. MILLER. Yes.

Senator LEAHY. These questions are on behalf of Senator Thurmond. Senator Thurmond says in his question you told his staff that after you received the letter of reprimand, in which you were either in or out as U.S. attorney because of this letter, if that is the case, did you not feel that an incident of such significance should have been brought to the attention of the Judiciary Committee.

Mr. MILLER. I do not understand the "in or out," I do not recall.

Senator LEAHY. Well, I understand from Senator Thurmond's question that you felt, based on this letter, that you were about to get the word that you were either going to be U.S. attorney or not going to be U.S. attorney, because of the nature of it. I mean, obviously they could have asked you to resign or anything else. Did you have that feeling, that this was presaging, that this letter was either giving you hell but letting you stay, or giving you hell and about to tell you to go?

Mr. MILLER. I thought it gave me hell and let me stay. I thought the real result, you know, if they did not want me, I would have been gone.

Senator LEAHY. Okay. Mr. Miller, you were given the letter of reprimand, as Senator Thurmond understands it, for two reasons: The first was due to the fact that, because of your personal assessment of evidence that would be admitted at trial, you refused to sign an indictment in the case of *United States* v. *William G. Lauer and Sterling Paving Company.* This action was a departure from the long-standing customary practice of the U.S. attorney in Colorado.

Secondly, after advising Assistant Attorney General Paul McGrath that you would do nothing to make your personal views public, that same afternoon you stated to the press that the case was unprosecutable. Mr. Miller, Senator Thurmond asks, do you believe that you acted properly and ethically in declining to sign the indictment and making public your personal views in the case prior to the trial?

Mr. MILLER. I feel I acted properly. As I sit here today, I am still proud of that decision. I think it exhibits the kind of independent judgment that I would hope other U.S. attorneys have and judges have. It has been a tough process for me, believe me, but I would

do it again and I think it was a proper, ethical decision. I think my comments to the press were proper and ethical and I am proud of the whole event.

Senator LEAHY. But do you think that making your views public were part of that same exercise of discretion and independence?

Mr. MILLER. I think, given the conditions under which I made the public comment, it was the proper thing to do because if I had not said the case was unprosecutable, the story by Mr. Toohey was going to be that the antitrust lawyers from San Francisco were incompetent, that there had been too many immunities given in our case, and that the witnesses were weak, and he told me that that was going to be his story if I did not make a comment, and in a manner of seconds I thought it would be better for me to say that the case was unprosecutable than to have a story like that running and, as I say, I only had the grand total of a couple of seconds to make that decision and I think it was the right one.

Senator LEAHY. Mr. Miller, had the Antitrust Division been involved in any other bid-rigging cases in Colorado?

Mr. MILLER. Yes.

Senator LEAHY. And what were the results of those cases? Again this is Senator Thurmond's question.

Mr. MILLER. Well, we had—this Sterling-Lauer was what we called cleanup indictments, because we had had eight major cases I think involving 24 individual or corporate defendants. We had had four trials, seven out of the eleven defendants in those trials had been acquitted, and some of them had definitely plead guilty and been fined. Two cases were dismissed between indictment and trial, because the evidence fell apart, and then we did have another series of investigations and another plea in another unrelated case. We have had a number of antitrust cases. In fact, at that time, Senator, we had an entire grand jury devoted to nothing but antitrust matters.

Senator LEAHY. Incidentally, what has your attitude been in talking to the press since this matter?

Mr. MILLER. I did not hear the question.

Senator LEAHY. What has been your policy of talking to the press about your personal views on a case since this matter?

Mr. MILLER. My views have always——

Senator LEAHY. Or maybe I should say what has been your policy? What has been your policy?

Mr. MILLER. My policy is I do not talk about cases. I have tried as best I can in my 16 years to subscribe to the guidelines that we are all supposed to follow, not commenting on the evidence, the facts and the strength of the case.

Senator LEAHY. The summary I have of cases that are referenced in Senator Thurmond's questions is that you have had convictions of seven corporations, eight individuals, acquittals of three corporations and four individuals, voluntary dismissals of one corporation and one individual, and pending one corporation and one individual, $1,615,000 in fines paid by seven corporations, $320,000 fines paid by six individuals, 51 months imprisonment served by eight individuals, and that does not include 18 years of suspended sentences and probations. Does that sound pretty accurate to you?

Mr. MILLER. I think it is pretty accurate, except the totals are four corporations and five individual acquittals.

Senator LEAHY. This is probably an earlier one that I had.

Okay. Senator Thurmond also wanted to ask this question: you contend that the letter of reprimand was not an official letter of reprimand, but a private letter between you and the Attorney General. It is my understanding that the letter was personally delivered to you by the Director of the Executive Office for U.S. Attorneys. Would you please tell the committee how you make the distinction that the letter was not an official letter of reprimand? Understand, that question is not coming from "soft paw" Leahy, but coming from Senator Thurmond himself.

Mr. MILLER. Good morning, Senator.

Senator THURMOND. How are you?

Mr. MILLER. Well, the reason I did not think it was an official reprimand was that I did think that I was in some Department of Justice politics and that I thought that—I read this letter, and not long before this I had the ex-chief of the Criminal Division who, by the way, is sitting in the back of the room, now in private practice, who had got an official letter of reprimand. He has authorized me to say that. And that outlined for him various accoutrements of due process; that he could appeal, that he could respond, that it would be in his file, and he did appeal, frankly, and won that. So it was pretty obvious to me that this was not what we were talking about.

Senator THURMOND. Mr. Chairman, I would just like to point out that Mr. Miller is a presidential appointee, and the letter of reprimand which he received had been cleared by the White House.

Additionally, the Department of Justice guidelines for a letter of reprimand do not pertain to presidential appointees. The letter he read from former Attorney General William French Smith was an official reprimand as we understand it.

Mr. Miller, in your November 7, 1984, letter to Mike Shaheen, you state in part, "I chose to explain my actions to Mr. Toohey by using rather broad and ambiguous terms to avoid the public appearance of a coverup that would result from a "no comment" and to prevent damage to the public confidence and integrity of the Antitrust Division."

Would you tell the committee what was the coverup to which you were referring, and did you give any thoughts as to what effect your comments to the press might have on the integrity of the *Sterling* case?

Mr. MILLER. I missed the last part of the question, Senator. I could not hear you.

Senator THURMOND. Did you give any thought as to what effect your comments to the press might have on the integrity of the *Sterling* case?

Mr. MILLER. I did think about all of that, and I simply thought that the allegations that the reporter had told me that he had from sources seemed to me to be as damaging as anything could be in this particular climate, and so by saying that the case was unprosecutable, making the decision in a matter of seconds to kill something that I thought was going to be a whole bunch more damaging

than what I said I thought was maybe the choice of the lesser of the two evils at that point.

Senator THURMOND. What coverup did you refer to?

Mr. MILLER. Only that the case was weak, that we had given too many immunities and the prosecutors were incompetent, I think was the allegations.

Senator THURMOND. Mr. Miller, you have stated that Attorney General Smith assured you that the letter of reprimand would not be in your personal file, that the matter was just between you and the Attorney General, that the letter was "no big deal." In fact, when my staff questioned you about why you had failed to tell the committee about the reprimand, you said that the Attorney General had told you that it would not be in your file, and that if you cannot trust the Attorney General who can you trust.

Mr. Miller, from this statement, how can anyone draw a conclusion other than to say that you intentionally withheld information on the reprimand from the committee because you did not think we would find out about it?

Mr. MILLER. Senator, I knew just the opposite. I knew from Mike Shaheen that that letter would be in his files and would be discovered by you, that is why I wrote my response that I did write. I certainly would not have told 50 or 60 people about it before this process if I thought it was going to be kept a secret. In Colorado, the American Bar Association representative already knew about it, and members of the Wirth Committee knew about it before I arrived there to ask me about it.

It simply was not a very closely held secret where I live and I certainly had no intent whatsoever to keep it from the committee.

Senator THURMOND. Mr. Miller, when you were completing the committee's questionnaire, did you give any thought to the letter of reprimand and, if so, how did you reach your decision not to disclose the letter to the committee?

Mr. MILLER. I did look at the questions and I think the two questions that came to mind that were possibly where the letter would be responsive, I looked at it and I came to the conclusions that I came to for the reasons that I have discussed here earlier and I did ask my first assistant, after telling him what my conclusions were, if he agreed with me and he said that he did, so on that basis I went ahead and made the decision.

Senator THURMOND. Did you agree that the information was unfavorable?

Mr. MILLER. No, I do not think today or when I was completing this questionnaire, I did not think it was unfavorable. It had been a very favorable result in our district, the outcome of these cases or at least the decision I made in these cases had been hailed as being correct by the media, it had been ratified apparently and vindicated by the judge's decision and so I did not view this as an unfavorable event. I did at the outset, for sure, when I first got the letter it was unfavorable, but the events that followed I think made them favorable events, rather than unfavorable.

Senator THURMOND. Did your first assistant agree to that?

Mr. MILLER. Yes, he did.

Senator THURMOND. Mr. Miller, you stated, and Congressman Brown told the committee, that you reported the letter of repri-

mand to the American Bar Association, the FBI, and Senator Wirth's Judicial Nomination Review Committee prior to the Judiciary Committee raising it as an issue. Would you please tell the committee who on the ABA, the FBI and Senator Wirth's Judicial Nomination Review Committee you discussed this matter with?

Mr. MILLER. Yes, I would be happy to. The ABA representative was James Clark, and I did not unilaterally disclose it I guess because he already knew about it and he asked me about it and he is a lawyer in Denver.

On the Wirth 15-member committee, the person that raised the issue was Jim Lyons, who is also a private practitioner in Denver, and he raised the issue to me.

I forgot the other one you asked me besides those two.

Senator THURMOND. The FBI.

Mr. MILLER. The FBI was Bill Gavin, who was the Special Agent in charge of the FBI at that time.

Senator THURMOND. Mr. Miller, you were interviewed by the FBI in September of 1986 in connection with your nomination to the Federal bench. There is no indication in that interview that you discussed the letter of reprimand with the FBI agent at that time or any other time. You have indicated that at some time you spoke with Special Agent William Gavin regarding this matter. However, Special Agent Gavin, transferred to Washington, D.C. in July of 1986, several months prior to your nomination to the district court. It appears that the information which you provided the committee regarding your disclosure to the FBI was misleading. Do you care to comment on this matter?

Mr. MILLER. I do not quite understand it. I talked to Bill Gavin shortly after I got the letter, certainly not during this process at all, but shortly after I received the letter from the Attorney General, I discussed it with him and that would have been back in 1984.

Senator THURMOND. Of course, Mr. Gavin had nothing to do with your nomination then?

Mr. MILLER. No.

Senator THURMOND. Mr. Miller, the committee has been informed that the attorney for the defendant in the Sterling case, Dan Sears, repeatedly prior to the trial tried to enlist your support as well as the support of one of your assistant U.S. attorneys. Would you tell the committee how Mr. Sears attempted to enlist your support, and did you in fact assist the defense in any way?

Mr. MILLER. No, I think Dan Sears had made requests on both Bruce Black and I to testify as to why we were not in favor of the indictment and we refused, and that was the end of it. I did not assist anybody.

Senator THURMOND. Mr. Miller, in October 1985, you were contacted by the Office of Professional Responsibility regarding allegations which had surfaced during the investigation of the chief deputy U.S. marshal. In January of 1986, OPR investigators interviewed you regarding these allegations. A July 20, 1986, letter from Mike Shaheen of OPR to you stated in part:

"Information was provided which raised questions as to the propriety of your conduct in certain matters." Now, why did you fail to report this information to the Judiciary Committee?

Mr. MILLER. Because that letter goes on to say, in the last paragraph, that there has been no improper conduct on your part, and I thought that that concluded it as not dispositive maybe, but certainly not a negative when there is a finding of no improper conduct.

Senator THURMOND. Mr. Miller, you have stated that you were told by OPR that the inquiry into the Moyer allegations were routine and that you were never under investigation by OPR because the OPR letter dated July 28, 1986, referred to their inquiry, you stated that an inquiry is not the same as an investigation. The letter from OPR stated in part, "Information was provided which raised questions as to the propriety of your conduct in certain matters. Specifically, the information indicated that you may have, first, utilized U.S. Marshal Service vehicles for transportation from the office and the airport to your personal residence on numerous occasions; second, driven for several months a seized Mercedes-Benz automobile which was intended for use in a drug investigation; and, third, received from Mr. Moyer free of charge four airline tickets during the time Mr. Moyer was the subject of a criminal investigation."

Now, Mr. Miller, is it your belief that this inquiry into the propriety of your conduct was so insignificant that you should not have reported this information to the committee?

Mr. MILLER. No, I did not say it was so insignificant. I simply said that I did not see where on the form that it was called for, that it was an inquiry which is an informal checking of the facts and, after an informal checking of the facts, it was found that there was no improper conduct so I simply did not see a place on the form that called for that sort of checking.

Senator THURMOND. Mr. Miller, what was the result of the airline ticket inquiry?

Mr. MILLER. Pardon me?

Senator THURMOND. What was the result of the airline ticket inquiry?

Mr. MILLER. The result was that I sent him I think $300 and I received a letter back that said the case was closed.

Senator THURMOND. Mr. Miller, again you did not report the OPR investigation even as unfavorable information, which is called to be disclosed in Question No. 12 of the confidential portion of the committee questionnaire. Did you consider reporting this information and, if so, why did you not report it?

Mr. MILLER. Question 12?

Senator THURMOND. In Question 12.

Mr. MILLER. I do not have a Question 12 on my sheet.

Senator THURMOND. Question 12 on the confidential——

Mr. MILLER. I do not have—I must have a different confidential form, because I do not have a number 12.

Senator THURMOND. Under "please advise the committee of any unfavorable information that may affect your nomination," and you have replied "none."

Mr. MILLER. Yes. I honestly did not think that a finding of no improper conduct was unfavorable.

Senator THURMOND. Mr. Miller, if any of the allegations which were made against you had proven to be true, you would have at

least been guilty of violations of the Official Standards of Conduct and could have been fired. This instance appears to have been more than a routine matter. When asked by my staff if you thought that the OPR inquiry was unfavorable, you replied that, at worst, you thought that it was neutral. Why did you not think that this matter was significant enough to at least be brought to the attention of the Judiciary Committee?

Mr. MILLER. I thought the matter was what, Senator? I did not hear.

Senator THURMOND. I said why did you not think that this matter was significant enough to at least be brought to the attention of the Judiciary Committee?

Mr. MILLER. I understood that part, but the phrase before "I thought it was," I missed the word.

Senator THURMOND. Well, you replied that you thought it was neutral.

Mr. MILLER. Oh, neutral. I think that is what it was, was neutral. It certainly was not unfavorable, in my view.

Senator THURMOND. Mr. Miller, the committee has received information that a complaint was filed with OPR by Mr. John R. Wilkinson alleging that you violated his civil rights when you brought criminal charges against him for refusing to pay a $1 toll. Would you tell the committee the circumstances surrounding this matter and why again you failed to disclose this complaint to the committee and to the FBI?

Mr. MILLER. I do not recall anything about that.

Senator THURMOND. Mr. Miller, there have been concerns raised regarding your former ownership of stock in the Grand Mesa Kennel Club and investigations which occurred as a result of that venture. These investigations were initiated because of possible involvement by organized crime figures. Will you please tell the committee how you became involved in the ownership of this stock and what were the results of the investigations which were conducted by the Colorado Racing Commission and the Colorado Organized Crime Strike Force?

Mr. MILLER. My recollection of that was in 1980, while I was still district attorney in Greeley, myself and one of my friends formed a partnership for our children's benefit in education, and we decided to buy some new issue stocks from a stock broker who also lived in Greeley. We were not alone in this. A few of our friends that we knew in Greeley also invested. We invested in the Grand Mesa Kennel Club, which was to be built in Fruita, Colorado, outside of Grand Junction, and it never did come to pass. We lost that investment.

Several months after we made the investment, I think the Denver Post ran a story that we were not the only investors in Greeley, but that there were some investors in Denver who were unsavory characters, I guess would be the best, at least that was their description.

As far as I know—and I did not know that anybody had been investigated until I got the newspaper clip and sent it to your staff, and at that time I recall that the newspaper said that there was going to be an investigation. My information is that there was not an investigation. A member of the Racing Commission did come

and talk to me about the fact that we had—as I recall, the stock had been purchased in my partner's name and I had written a check, and there was a question about why we did not have it in both people's names. He was satisfied that it was simply a bookkeeping error and that was the end of it.

Senator THURMOND. Mr. Miller, when you were nominated to be U.S. Attorney for the District of Colorado in 1981, you were contacted by my staff regarding an investigation into the Grand Mesa Kennel Club. During the course of your nomination to the Federal court, you again responded to a question on an FBI security form that asked the following question: To your knowledge, have your activities or those of any of your business enterprises or associates in those enterprises ever been the subject of a criminal investigation or a civil enforcement investigation or proceeding? If so, give full details.

I believe you responded to this question by stating no. In June of this year, my staff questioned you on your response. You replied that you did not recall the investigation. However, a September 1981 newspaper article you later provided the committee stated in part: "State officials are investigating whether there are secret owners of a company planning to build a western slope dog racing track. Organized crime and state racing commission investigators are seeking to determine whether any of the following have undisclosed interest in the company: A convicted drug peddler named Peter Iacino and at least two companies that have been associated with gamblers or felons in the past; Greeley District Attorney Robert Miller or anyone else in the partnership in which Miller is involved—Miller is in line to be come Colorado's U.S. Attorney."

The article continues by stating: "One man who is known to have owned some of Grand Mesa's stock without his name being reported by the company to the Commission is Greeley District Attorney Miller. He is widely reported to be in line to be named by President Reagan as Colorado's next U.S. attorney and top Federal prosecutor in the State. Miller said he did nothing himself and disclosed all his holdings to FBI agents investigating his background for his appointment. Miller bought stock as an insider this year, after Iacino was out of the picture. It was owned equally by himself and two other partners in the company set up to pay for their children's education, Miller said. Miller said he has since transferred his share to his brother. That transaction does not show up in company records, either. Transfer of insider stock cannot be made for 2 years after it is issued under Federal rules. If Miller's stock so easily escaped the Commission's attention, investigators want to know if any other unusual stock transactions have occurred between listed insiders and others. Two other companies have caught investigators' eyes, stock registered in the name of George Vendegnia was paid for by check from Hair Shaft, Inc., a hair-styling salon. Investigators also want to know how closely connected Denver businessman Sam Calvaresi is to the company. A $20,000 check to the company from Calvaresi for stock in the track apparently had been dated 3 months before the stock was offered even to the insiders and that raises the possibility he was closer to the principals than other stockholders."

Mr. Miller, you were aware in 1981 that the Grand Mesa Kennel Club was under criminal investigation. Why did you fail to report this information?

Mr. MILLER. I am aware, and I was only reminded when I pulled out that newspaper article that the newspaper said they were under criminal investigation. To my knowledge, I do not know that they actually were.

Senator THURMOND. Were you contacted by the Colorado Crime Strike Force concerning this?

Mr. MILLER. No, I was not. I was contacted by a member of the Racing Commission who talked to me about the difference in the ownership, I think.

Senator THURMOND. I believe you were contacted by the Racing Commission investigating this matter?

Mr. MILLER. The Racing Commission, but not the Organized Crime Strike Force.

Senator THURMOND. Mr. Miller, the investigation of the Grand Mesa Kennel Club occurred only 6 years ago. Additionally, the articles which you sent the committee place a fair amount of notoriety on your ownership in the Grand Mesa Kennel Club stock, as well as the investigation which took place at that time. How do you respond to the concern that in 6 years you would forget about the events surrounding the Grand Mesa Kennel Club?

Mr. MILLER. I did not forget about the events, I just knew that I had not been investigated and that is the part I did not remember and that is the part that I only remembered upon supplying the article to your staff.

Senator THURMOND. You did not remember that your company has been investigated also?

Mr. MILLER. I had remembered that there was a statement in there that the company may be, and I remembered that the company never did go and that we lost our money. That is the main thing I remember.

Senator THURMOND. But you did not report to the FBI that the company had been investigated, did you?

Mr. MILLER. It was not my company. I owned stock in the company like anybody would own stock in General Motors, the principals were the ones who were under investigation.

Senator THURMOND. Mr. Miller, it appears that once individuals who own stock in the Grand Mesa Kennel Club came under scrutiny by investigators, you transferred your interest in the partnership to your brother. Additionally, you provided a July 1, 1981, handwritten statement to the committee which stated that you had transferred and conveyed your interest in EBR Enterprises to your brother. This transfer includes the stock in the Grand Mesa Kennel Club. Your statement also indicated that you and your brother would share equally in the profits or losses arising from your brother's ownership of the stock transferred to him. In actuality, therefore, it appears that the transfer had no effect on your control of the stock. How do you respond to this matter?

Mr. MILLER. Well, I really did not have any control over the stock anyway, it was myself and another person and my brother and I, essentially, because of that note, end up splitting a half, which made it a quarter, with the person who had a half interest.

Senator THURMOND. Mr. Chairman, I ask that this letter be made a part of the record.

Senator LEAHY. Without objection, so ordered.

[The letter and statement referred to follow:]

United States Attorney
District of Colorado

Byron G. Rogers Federal Building
Twelfth Floor, Drawer 3615
1961 Stout Street
Denver, Colorado 80294

Criminal Division
303/844-2081
FTS/564-2081
Civil Division
303/844-2064
FTS/564-2064
Collections
303/844-5938
FTS/564-5938

July 21, 1987

The Honorable Strom Thurmond
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Attention: Mr. Duke Short

Dear Senator Thurmond:

Frank Klonoski of your staff has asked me to respond to three areas of concern which apparently remain concerning my responses to the questionnaire propounded by the Senate Judiciary Committee.

I believe we previously discussed all these areas thoroughly in our interview on June 19, 1987. At that time I also gave you a copy of my letter to Laura Nelson with several attachments which covered, in detail, my explanation of why I did not report on the Senate Judiciary form either the letter from the Attorney General or the Moyer matter. To summarize, I did not report either matter because I honestly did not believe either matter was responsive to any question on the form. As a trial lawyer for 22 years, precise questions and answers have a great deal of significance to me, especially when those questions are propounded by the Senate Judiciary Committee which plays such a significant role in our legal system. That is why I tried to measure each word in the questions and respond as precisely as possible.

I did not view the Attorney General's letter as responsive to the 9th question of Part IV because it was not a formal proceeding by a professional group as envisioned by that question. My understanding of that question was in the context of grievances to a bar association or other

professional groups having a formal procedure. I did, however, disclose three incidents that fit that definition.

I did not view the Attorney General's letter as unfavorable information as sought in question 12 of Part IV even though the Attorney General said some unfavorable things about me in the letter. I did not view it as unfavorable because of the personal assurances the Attorney General gave me at our meeting in his office in November, 1984, when he told me, among other things, that the letter was just between us; that it was not to be placed in my permanent personnel file and that it would not interfere with my future professional career including being selected as a judge. Furthermore, my refusal to sign the indictment, which was the cause of the letter, was hailed as reflecting favorably upon me by most people in Colorado, including both of Denver's major daily newspapers, one of which wrote an editorial supporting my action. I believed--and continue to believe--that my action bears favorably upon my nomination to the bench because it demonstrated an exercise of independent judgment and a strict adherence to established standards of professional ethics needed by a judge to properly perform his job. When the court later dismissed the case at the conclusion of the government's evidence, I was convinced I had been right in my refusal to sign the indictment and therefore the entire episode was favorable. This conviction was further buttressed when the Justice Department recommended me to President Reagan for the district court judgeship. I must assume that the Department selected me with full knowledge that I had received the letter.

I have never viewed the Attorney General's letter as an official reprimand because it was personally addressed to me in the same manner as are most personal letters. The letter did not say it was an official reprimand. It was not in memorandum format. The letter did not include citations to regulations or a recitation of my right to appeal and other procedural requirements for letters of reprimand. Indeed, the letter contained not even the slightest suggestion that I had violated any law, regulation or rule. I viewed the letter merely as a management tool or, as former Deputy Attorney General Lowell Jensen has characterized it, "a shot across my bow" that ended with the letter.

The implication of your question appears to be that I failed to disclose the Attorney General's letter because I

was trying to hide something. That simply is not true. As I have said, this episode was viewed favorably in Colorado. A great many people had seen the letter or knew about it. I told many of my friends and associates about the letter. I told many of the attorneys in my office about it and some saw it; I told the Special Agent in Charge of the Denver FBI office about it; I believe I told other U.S. Attorneys about the letter; many members of the bar knew or heard about it and I believe some of the press knew about the letter.

Furthermore, when asked about the anti-trust case when interviewed by the 15-member bipartisan committee appointed by Senator Wirth to evaluate candidates for the federal bench, I willingly disclosed the Attorney General's letter. I also disclosed the letter to the American Bar Association examiner, James Clark. Most important, I knew from Mike Shaheen, Director of DOJ's Office of Professional Responsibility, that he had a copy. In October of 1984 Mike told me that the FBI would routinely check with his office on all judicial nominees of Department employees. Thus, I knew in 1984 that the Moyer matter would be a part of the FBI background report, and quite possibly the Attorney General's letter would too. It would be foolish of me to think that I could hide something that was so widely known, and if I had thought the letter to be unfavorable to me, I would not have told so many people about it. In fact, I was and am proud of the decision I made in that case. I believed I was right when I made the decision. I believe subsequent events proved me right and I certainly had no motive to hide that episode and the letter from the Committee.

I did not disclose the Office of Professional Responsibility inquiry arising out of the Moyer investigation because again, I did not believe it was responsive to any question on the Senate Judiciary Committee form.

It was apparent to me that I had not been "cited or disciplined" by any court or professional group for this episode as specified in question 9 of Part IV. I also knew that a "complaint" had not been filed against me by anybody because the Office of Professional Responsibility told me this was merely a "routine" matter they had to check as a result of information developed from the Moyer investigation. Furthermore, I had never seen a "complaint" and I had never been told there was a "complaint." It was also apparent to me that I was not under "investigation" concerning the Moyer matter as specified in question 8 of Part IV. Having been a prosecutor for 16 years and having conducted many investigations myself, I believe I can recognize when someone is under investigation. The first legal requirement every investigator

knows is that he must advise persons he interrogates under investigation of his Miranda rights. I was never advised of my rights or told that I was under investigation. Normally the investigator does not call up the person under investigation and tell him of the allegations and ask to discuss those allegations with him. This is precisely what the Office of Professional Responsibility did with me, in that I was simply asked to explain the full circumstances in which certain facts occurred and to provide certain documentation of these explanations. None of the usual indicia of an investigation, including subpoenas or grand jury involvement, were present in the inquiry concerning the Moyer matter.

When I reviewed the letter of July 28, 1986, from the Office of Professional Responsibility prior to answering the Senate questionnaire, I noted the use of the word "inquiry" four different times. In fact, at that time, I underlined that word. "Inquiry" is a word that has particular significance to me since our office does preliminary inquiries almost daily. To prosecutors and federal investigators "inquiry" means merely an informal check of the facts to see if there is sufficient evidence to proceed to an investigation. I did not view my reasoning as legal hairsplitting or a cute way to avoid disclosure because in my position I have been very sensitive to the distinction that must be made between inquiry and investigation. People frequently make accusations against elected officials or other prominent citizens for a variety of reasons and those must be checked out without the necessity of implementing all of the requirements of an investigation. Otherwise, many public officials and others would be under constant investigation. In my view, the distinction between the terms inquiry and investigation is an important one, grounded in the need to protect individuals, as well as public officials, from the stigma that attaches to persons who were under formal investigation.

Additionally, I did not view this inquiry as unfavorable as specified by question 12 of Part IV since the Office of Professional Responsibility found no improper conduct on my part and closed the inquiry. I simply could not and cannot imagine that the mere occurrence of an inquiry in and of itself is unfavorable, especially when the conclusion is a finding of no impropriety.

As in the matter of the Attorney General's letter, I asked my First Assistant for his interpretation of the responsiveness of this matter to the specific questions of the Senate questionnaire and he concurred with me. I also

knew from Mike Shaheen that this letter would routinely be acquired from his office by the FBI and it would be part of the file the Committee would have. To say that I attempted to hide this matter from the Committee while knowing the above information simply defies the imagination. I would have no motive to do so when OPR's conclusion was "no improper conduct."

In response to questions 8 and 9, Part IV, I did disclose matters which were squarely responsive to the questions which should indicate my intent to disclose those matters called for by these questions. In this regard, it is especially distressing to me that dishonorable motives would be attributed to my omission of information which could only be deemed responsive under the broadest, most casual reading of the specific wording of the questionnaire, particularly when the substance of that information is not unfavorable or damaging to me and when I have demonstrated candor and completeness in otherwise responding to the specific questions asked by the Committee, the FBI, the ABA, and the Wirth Committee.

Regarding the Grand Mesa Kennel Club stock, after my appointment as U.S. Attorney in 1981, but before confirmation, I gave you a written explanation of those events. Apparently that explanation was satisfactory at that time. Unfortunately I do not have a copy of that letter, but I recall that you had one when I was in your office. Since that explanation was done much closer in time to the events, it still represents the best recitation of the facts.

With the exception of Mr. Dickson, I did not and do not personally know any of the other investors mentioned in the attached newspaper clippings, nor was I aware of the identity of any of the other investors at the time of the investment. In fact, I was totally shocked to learn of their ownership of stock.

I believe Mr. Dickson had already subscribed for the stock when we agreed to form an investment partnership, EBR, in November of 1980. At that time we both signed a bank loan for the purchase price. I subsequently transferred my interest in the EBR investment partnership to my brother in exchange for him assuming my liability on the note at the bank. However, the bank later would not allow him to solely replace me, so he signed the note in addition to me, the net effect being that my brother and I equally shared a one-half interest in EBR, even though I had transferred my interest to him.

I had forgotten until I recently reviewed the attached newspaper clippings that there had been any mention of an investigation of these matters. I do recall that a representative of the Colorado Racing Commission discussed the ownership issue with me in September 1981 and he was satisfied that a simple mistake had been made by Mr. Dickson and me in putting the stock in the name of Mr. Dickson instead of in both our names individually.

To the best of my information and belief, I was not the subject of a criminal or other formal investigation concerning my investment in this stock or for any related activity. I have checked with Rene Raimarez, who at the time was the Assistant Attorney General assigned to the Racing Commission and is now the Director of the Racing Commission, and he assures me that I was not under investigation for a violation of a crime or a regulation, but rather every investor in a race track must, by Colorado statute, have a general background investigation to verify character, financial stability, etc. That was the only investigation subjected to in this matter. My connection with other individuals mentioned in the attached newspaper articles who may have been the subject of such investigation was limited to the pure coincidence of investment in the same stock.

By the way, Grand Mesa Kennel Club, after receiving a conditional license from the Colorado Racing Commission, never went forward and our entire investment became worthless.

I trust that this information adequately explains the context in which I responded to the Judiciary Committee's original questionnaire. If, indeed, my interpretation of the intent of the Committee's apparently specific questions was incorrect, I am hopeful that dishonorable motives will not automatically be imputed to omissions in my responses. In each instance, I honestly believed that the information in question did not reflect unfavorably upon me and had been disclosed elsewhere in my background investigation. I am likewise hopeful that, in the final analysis, the Committee will recognize that the substance of these matters does not

discredit me and that the particular form of the Committee's questions should not obscure that fact.

Sincerely yours,

Robert N. Miller
United States Attorney

RNM/nt

Enclosure

In consideration of the assumption of notes of EBR Enterprises and myself individually at Cache National Bank, Greeley, CO. I hereby transfer and convey my interest in EBR Enterprises to William H. Miller of Salt Lake City, UT.

It is understood that there is joint and several liability on the notes which total approximately $89,000 at the Cache National Bank.

It is further understood that the assets of the partnership include primarily securities in the following amounts and in the following companies:

15,000 shares of Energy Oil.
60,000 shares of McBay Oil.
100,000 shares of Petro Max.
100,000 shares of Metro Cable.
200,000 shares of Grand Mesa Kennel Club.
Done this 1st day of July 1981.

ROBERT N. MILLER.

It is further understood that William H. Miller and Robert N. Miller will share equally in the profits or losses arising from William H. Miller ownership of the stocks transferred to him. This is further consideration to Robert N. Miller for conveying said stocks to William H. Miller.

Senator THURMOND. Mr. Miller, the transfer of stock to your brother reportedly took place prior to you filling out your financial disclosure report. However, a copy of the financial report dated September 10, 1981, indicates that you listed the EBR Partnership as holding interest in the Grand Mesa Kennel Club. Would you please respond to this matter?

Mr. MILLER. I did not understand the first part of the question.

Senator THURMOND. The transfer of stock to your brother reportedly took place prior to your filling out your financial disclosure report. However, a copy of the financial report dated September 10, 1981, indicates that you listed the EBR Partnership as holding interest in the Grand Mesa Kennel Club. Would you please respond to this matter?

Mr. MILLER. Surely. The EBR, which was named after our kids, was a partnership and the interest I transferred to my brother was an interest in the partnership, not in the stock. The partnership was holding the stock in the various companies that we bought.

Senator THURMOND. Mr. Miller, did anyone suggest to you that you should not become involved in the Grand Mesa Kennel Club venture and, if so, who and what did they say to you?

Mr. MILLER. I do not recall anybody telling me. I wish they would have.

Senator THURMOND. Mr. Chairman, those are all the questions we have at this time.

Senator LEAHY. Thank you, Senator Thurmond.

Mr. Miller, is there anything else you want to add? The record will be open for any questions that Senators may want to submit.

Mr. MILLER. Only that I do appreciate the opportunity to come here and appear before you and, although I guess it does concern me somewhat that most of today's session has been on the negatives, apparently that is part of the process. I have been in public life for 16 years and I have done a lot of positive things, I think a lot of good things with victims, with witnesses, and with prosecutions that were just and right, and in all those 16 years I was one of the few lawyers who swore to do justice in the courtroom and I will continue to do that in my present job and I would certainly do that if you are kind enough to vote me onto the Federal District Bench of Colorado.

I appreciate your courtesy and your time. Thank you very much.

Senator LEAHY. Thank you very much, Mr. Miller. Please understand that the reason these questions were asked is that these are the ones we will give you a chance to respond to. There are an awful lot of very positive comments made in letters and statements of other members of the congressional delegation and so on about you. I was sure that you would not want to refute any of those, so we did not go through that chronology. You are free to, of course, because the record will be open, but what I tried to do here, as these are the questions you have been asked the most, I think both Senator Thurmond and I wanted to give you a chance to give your side.

Mr. MILLER. I certainly appreciate it and thank you for your courtesy.

Senator LEAHY. Thank you very much.

Senator THURMOND. Mr. Miller, I just want to say that we certainly want to be fair to you and give you every opportunity to answer.

Mr. MILLER. I really appreciate that. Thank you very much.

Senator LEAHY. The next witness is Assistant Attorney General Stephen Markman. Is Mr. Markman here? Will you please stand and raise your right hand?

Do you solemnly swear that the testimony you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MARKMAN. Yes, I do.

Senator LEAHY. Thank you. I understand that you have an opening statement, Mr. Markman.

TESTIMONY OF STEPHEN J. MARKMAN, ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. MARKMAN. I have a brief statement, Senator.

Senator LEAHY. Go ahead.

Mr. MARKMAN. Mr. Chairman, Senator Thurmond, I am pleased to testify this morning concerning the nomination of Robert N. Miller, to the District Court for the District of Colorado.

As you know, Mr. Miller has been the U.S. Attorney for the District of Colorado for the past 6 years and has achieved an outstanding record as a public official and a reputation for fairness and integrity as a prosecutor. As the numerous letters of commendation received by the Department and the committee attest, he is well regarded in Colorado, where he has lived and worked since graduating from the University of Colorado Law School more than 20 years ago.

We take great pride in nominating Mr. Miller for the district court vacancy in Colorado. We have been requested by the committee to testify on two matters relating to Mr. Miller's nomination: First, the circumstances leading up to the letter of reprimand issued to Mr. Miller by former Attorney General William French Smith in 1984; and, second, the nature of the Justice Department's responses to this committee for information on this nomination.

We will be happy to respond to any questions that you might have on these matters and appreciate the opportunity to share our perspective with you.

Thank you, Mr. Chairman.

Senator LEAHY. Thank you, Mr. Markman. We are glad to have you here. It is always good to have high-ranking members of the Justice Department at these hearings. During the fifty that we will have had by the end of today, I think that you and I guess Mr. Bolton and, actually in this case, also Mr. Trott are among the highest ranking officials to have attended. I hope that you will be able to go back and mention that the hearings do go on.

Now, Mr. Markman, you are familiar with the reprimand Mr. Miller received from Attorney General Smith in September of 1984. In our questionnaire we asked Mr. Miller whether he had ever been disciplined for professional misconduct and he answered no. He disputed both the question of whether the letter was an official reprimand constituting discipline and whether the subject of the letter was professional misconduct, and you have heard the testimony here today.

So, our issue becomes an interpretation of an act performed by the Attorney General in his role as the superior of all the U.S. attorneys in the country. Now, was the letter that Mr. Miller received an official reprimand?

Mr. MARKMAN. Senator, the letter was clearly a reprimand; by its own terms it was a reprimand. It uses the term "reprimand" explicitly. It was a reprimand in the view of the Department. It was a reprimand. The issue here, of course, is the perception of Mr. Miller; Mr. Miller, on the other hand, is quite correct that it was not an official reprimand. Official reprimand is a disciplinary procedure that is only available to the Attorney General in the case of individuals who are not presidential employees. As Mr. Miller shared with the committee, official reprimands which are a specific kind of disciplinary action also require certain elements of due process, none of which were accorded to Mr. Miller in this instance.

It was a reprimand. The department was concerned with Mr. Miller's actions, but Mr. Miller is quite correct, it was not an official reprimand and he may well have perceived there to be a significant difference in that fact.

Senator LEAHY. Was it an act of discipline?

Mr. MARKMAN. I would say it was an act of discipline.

Senator LEAHY. Is there an official reprimand for presidential appointees?

Mr. MARKMAN. No, sir, there is no official reprimand in this context. Normally, to the extent that an individual commits an action or conducts himself in such a way as to justify an official reprimand, if he is a presidential employee, it might well be the case that termination would be a serious option.

Senator LEAHY. But this was something that had been obviously signed off by the Attorney General. He signed the letter. It had been referred to the White House. There is really no higher place it can go other than going to the President himself.

Mr. MARKMAN. No, sir, that is correct.

Senator LEAHY. And was the conduct for which Mr. Miller received this reprimand, was that professional misconduct, in the department's view?

Mr. MARKMAN. In the department's view it was conduct that deserved a reprimand. In looking at Question 9, which I understand is in controversy here, it seems to me that the greatest ambiguity is whether or not the discipline that was accorded to Mr. Miller was one that was based upon a "breach of ethics or unprofessional conduct." It seems to me that reasonable people can differ on that.

Mr. Miller has obviously concluded, and we think has concluded in a way that a reasonable person might, that his discipline was not for unethical conduct, and was not for unprofessional conduct but simply was a rebuke because he had failed to comport himself with the administrative procedures of the department, and in the perception of the department had failed to comply with its request of him that he not speak with the media in the situation that was at controversy. So, it is an ambiguous matter, although I think is a reasonable——

Senator LEAHY. It is a what?

Mr. MARKMAN. I am sorry?

Senator LEAHY. I am sorry, I did not hear your last sentence. You think it is an ambiguous thing?

Mr. MARKMAN. I think it is an ambiguous matter. I think that reasonable people can differ with Mr. Miller. It may well be that reasonable people would have seen fit to respond to this differently, but it is our position that Mr. Miller's position was not outside the bounds of reasonableness.

Senator LEAHY. So, is it the department's view that it is a reprimand for professional misconduct or not?

Mr. MARKMAN. It is——

Senator LEAHY. Let me ask the question this way: Is it the department's view that this was a reprimand for professional misconduct? Yes or no?

Mr. MARKMAN. It is difficult for me to answer yes or no. It is, as I indicated, an ambiguous matter. It is our position that this was a reprimand, albeit not an official reprimand, and that Mr. Miller's conduct was inconsistent with the administrative procedures and the policies of the department. Whether or not that can be subsumed under the idea of "professional misconduct" I think is a very difficult question and I am not sure that was answered at the time by Attorney General Smith.

Senator LEAHY. And the department is not taking a position then on whether it is professional misconduct or not?

Mr. MARKMAN. We have not taken a position, no. Our only position is that it is a difficult question and that reasonable people could have answered it either way. The reprimand that was given to Mr. Miller, again, was given on the basis of criteria that are not necessarily set forth in that particular question.

Senator LEAHY. Well, you understand our concern. It is a remarkable letter and we have not figured it out. Senator Thurmond and I and the others do not know what kind of weight to give to it. I have never seen a letter like this, at least not since I have been involved in screening, addressed to a sitting U.S. attorney. Have you ever seen one like that?

Mr. MARKMAN. A letter of reprimand like that?

Senator LEAHY. Yes.

Mr. MARKMAN. I understand they are not frequent, but this is not the first such letter. It is not unprecedented. There are not a great many, however.

Senator LEAHY. Well, how many U.S. attorneys have received letters like this during this administration? I do not want you to go into names, but how many have received similar letters?

Mr. MARKMAN. I am told there is a handful, but I cannot give you specific numbers. I am told this is a very infrequent type of letter, but this is not the first one that has been issued during this administration.

Senator LEAHY. Would you check and find out how many there have been and let me know?

Mr. MARKMAN. Yes, sir, I will.

Senator LEAHY. Now, you have heard the testimony about the meeting with the Attorney General that happened about a month after the reprimand. Do you have a record of that meeting?

Mr. MARKMAN. I am aware, Senator, that none of the papers that we supplied to the committee made mention of that specific meeting. Upon learning of the existence of that meeting from Mr. Miller, we checked with Mr. Jensen, who was one of the alleged participants in that meeting, and he confirmed that that meeting did take place, and his recollection was very consistent with Mr. Miller's recollection of that meeting. Apparently such a meeting did take place with Mr. Miller and Associate Attorney General Jensen and Attorney General Smith in early November of 1984.

Senator LEAHY. Did Associate Attorney General Jensen make any memo or notes or diary entries or anything else about that meeting?

Mr. MARKMAN. To the best of his recollection, he did not and indeed we were not able to find any such memos.

Senator LEAHY. Did you check his calendar or day book or whatever he used?

Mr. MARKMAN. We asked his office to check his files very thoroughly and they were able to produce nothing on this.

Senator LEAHY. And was there anything on Attorney General Smith's calendar, day book or anything else?

Mr. MARKMAN. Well, we asked them for their files as well and I believe some of the material that we submitted to the committee did come from his files, but it is my recollection that none of those refer specifically to the November meeting.

Senator LEAHY. Much of Attorney General Smith's files have been destroyed, have they not?

Mr. MARKMAN. Obviously these are files that would be 3 years old, it is a new administration and sometimes there would be that possibility.

Senator LEAHY. Possibility? Have they been destroyed?

Mr. MARKMAN. I am sorry?

Senator LEAHY. Many of Attorney General Smith's files have been destroyed, have they not?

Mr. MARKMAN. Yes, sir, that is correct.

Senator LEAHY. If this meeting really negated the fairly harsh criticism in that letter, would that not be recorded somewhere? What is your experience?

Mr. MARKMAN. Well, I have spoken, as I indicated, to Mr. Jensen about that and his recollection again is very much consistent with Mr. Miller's recollection. It is his perspective that that meeting was basically called at Bob Miller's request, to try to reassure him that, notwithstanding the dissatisfaction in the department about his conduct in this specific case, there was no more generalized concern with his conduct as a U.S. attorney, his job was not in jeopardy, he continued to have the regard of people in the Department, that this was simply one episode that ought to be put behind him and that his future conduct ought to try to take into account the concerns the Department had about his performance in this case. It was a reassuring kind of meeting.

Senator LEAHY. Did you give consideration to this letter of reprimand when Mr. Miller's name was sent up to the President for appointment?

Mr. MARKMAN. Well, we were certainly aware of that letter of reprimand, Senator, and obviously everything is a factor. That letter of reprimand was something that we looked at very, very closely, and as I have indicated, it is not a normal occurrence. It is an unusual letter, and we focused on it very, very closely and, as is the case with most of our nominees, we had to weigh the strong points and the weak points. We are very comfortable after engaging in that balance in going forward with Mr. Miller's nomination.

Senator LEAHY. Senator Thurmond and I are going to have to go to a vote and some questions may have to be answered for the record. We may have to go back to this. You have been designated by the Department to respond to the question of the Department's responsiveness to our committee's request for information on this nomination. Let us just go through a couple of things, because you are quoted often as saying in effect that we move slowly here.

On April 22, about 7 months ago, I sent a letter to Assistant Attorney General Bolton with seven specific requests. The first request was to make available to the committee all Justice Department files reflecting the reason for the reprimand. It took 6½ months to get an answer on that one. In fact, the documents we received last week say that Assistant Attorney General Bolton sent a memo to various offices in the department seeking documents on the subject. He sent the memo on September 15th. Our request, of course, was on April 22nd.

Do you know if any other action was taken between April 22 and September 15 to try to collect these documents in response to the committee's request, other than sending letters saying that you were fully complying?

Mr. MARKMAN. Senator, obviously there has been some confusion here and this is unfortunate, because I know we want to work very closely with your committee. That letter, as you indicate, was sent on April 22nd. In short order, we communicated to the committee that letters seeking this kind of information ought to come under the Chairman's signature. A letter was promptly sent back on May 4th, with the same request.

We then indicated, I understand, over the telephone to Mr. Metalitz and perhaps other staff that we had some concerns with some of the questions and felt that some of the requests were for information that was inappropriate for the Department to be sharing with the committee.

In an effort to try to reconcile the differences that we had, we set up a meeting with Mr. Shaheen of the Office of Public Responsibility. Indeed I believe that two meetings were set up with Mr. Shaheen. It was our intent that those meetings would suffice as a response and that we would be able to accommodate you through those two meetings. In the event those two meetings would not be satisfactory we expected that you would communicate that to us and let us know the extent to which they had not been satisfactory.

We did not hear from you after those meetings and we assumed those meetings had been satisfactory in providing as much information as we felt we could. The next thing we heard was immediately prior to the recess, when Senator Wirth and Senator Armstrong indicated their objections to your returning Mr. Miller's nomination on the basis of the differences between the Department and the committee.

Senator LEAHY. Well, I am concerned because—and our time now is up because we are going to have to go to a vote—but we have had this pending before the committee since February. It has taken a long time getting some of the material. I would note, however, that that vacancy was there for 2½ years before you even nominated anybody. So we want to move rapidly but I would also point out that the Department itself and the White House has kept some vacancies like this one for 2½ years.

We will stand in recess for about——

Senator THURMOND. I would like to ask some questions.

Senator LEAHY. Okay. They are going to call regular order at exactly 10:30. So, we will recess until we come back.

[Short recess]

Senator HEFLIN (presiding). We will hear from Mr. Wolin and then we will come around with Senator Bradley and Senator Lautenberg and Congressman Rinaldo. We will go through introductions and then interrupt the procedure, since these Senators have to be at other places, such as Intelligence Committee meetings and other very important matters that they have, nearly as important as the process we are going through.

We will be delighted at this time to hear from Senator Bradley, if you would like to introduce Judge Wolin.

STATEMENT OF HON. BILL BRADLEY, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator BRADLEY. Thank you very much, Mr. Chairman. It is a pleasure to appear before the Judiciary Committee to introduce Judge Alfred M. Wolin, who has been nominated to fill a vacancy on the Federal District Court of New Jersey.

Judge Wolin has had a distinguished legal career in New Jersey. He currently served as a presiding judge for the criminal part of the Superior Court in Union County, New Jersey. He has served on the Superior Court for 7 years in both civil and criminal parts.

Although I have not known Judge Wolin prior to the nomination, I had the opportunity to solicit the opinion of many individuals in the legal community in our State, those who have tried matters before him as defense and as prosecuting attorneys, colleagues of his in the judiciary and those who know him by reputation.

I am pleased to report to the committee that Judge Wolin is universally well regarded by all whom I have asked. Judge Wolin has practiced law in New Jersey for 27 years, initially in association with his father, subsequently in his own law firm.

His legal career has also included service as a special assistant prosecutor in Union County, as the town attorney in the Roselle Board of Adjustment, as municipal prosecutor for the Town of Westfield, and as legislative aide to then State senator, now Congressman, here at the table, Matthew Rinaldo.

He has also served as president of Union County Bar Association, and currently serves at the direction of the Chief Justice of the Supreme Court of New Jersey on the Statewide Speedy Trial Committee, the Conference of Presiding Criminal Judges, and the Criminal Practice Committee. In short, Judge Wolin will bring to the Federal district court a wealth of experience as a trial court judge and as a practicing attorney in both civil and criminal matters.

I am particularly grateful to the chairman of the Judiciary Committee and all the members of the committee for responding to the requests of Senator Lautenberg and me for prompt consideration of the New Jersey nominees. Two weeks ago, I appeared before this committee to introduce Nicholas Politan to the committee, and last week the Senate confirmed Judge Politan as a member of the district court.

In the testimony that day, I related to the committee the current backlog in the Federal District Court for New Jersey, and there are over 6,400 cases pending before our district court, and each district court judge is assigned more than 500 cases. This is an impossible burden on the judges and results in unacceptable delays in prosecution and adjudication of important matters.

For much of this year, the district court has operated below the number of judges authorized by law. I would note that this understaffing has been the result of delays in submitting nominations by the President and not the result of any delays in the Judiciary Committee's consideration of the nominees. Even with the confirmation of Judge Wolin, the New Jersey District Court will still be short one judge. I hope that position will be filled quickly and hopefully with someone who has the experience and qualifications of Judge Wolin.

I am pleased to introduce him to you today for your consideration and I thank you for the opportunity to appear on his behalf.

Senator HEFLIN. We will be delighted now to hear from the distinguished Senator from New Jersey, who is as well distinguished as his colleague, Senator Lautenberg.

STATEMENT OF HON. FRANK LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you, Mr. Chairman.

I am pleased to be here with my senior colleague, Senator Bradley, and my colleague from the House, Congressman Rinaldo, to introduce and to commend to you Judge Alfred M. Wolin, who has been nominated to fill the vacancy on the District Court of New Jersey, created by the elevation of Judge Cowen.

Judge Wolin is a graduate of Rutgers University Law School and had engaged in the private practice of law in Elizabeth, New Jersey, for roughly 20 years, and during that time Judge Wolin distinguished himself by his contributions to the bar and to the public. His commitment to insuring equal justice under the law was reflected by his service as chief staff attorney to the Legal Aid Society of Union County. He served as secretary of the Union County Ethics Committee. He was also president of the Union County Bar Association, and Judge Wolin also served for a time as a Special Assistant Prosecutor.

In 1980, Judge Wolin was appointed to the State judiciary. He now serves on the State superior court, which is the trial court of general jurisdiction in our State's system. Judge Wolin sits in the criminal part, where he is a presiding judge. However, he has in the past heard civil cases.

He began his judicial service as a Judge on the Juvenile and Domestic Relations Court. I have heard from lawyers who have appeared before Judge Wolin. We asked them their view, and they say he is a fair judge. It is worth noting that I have heard from lawyers who have tried their cases in front of him and lost, that say he is a fair judge. They also say he runs an efficient courtroom. In the face of a tremendous backlog and delays in the Federal court system in New Jersey, Judge Wolin's administrative skills would be most welcome.

Judge Wolin is not known to have an ideological agenda, yet in his answers to the committee's questionnaire he recognizes that the Constitution is a living and breathing document.

Judge Wolin has received a rating of well qualified from the ABA. Mr. Chairman, I believe that Judge Wolin will be a credit to the Federal judiciary and will serve the people of New Jersey and the country well, and I commend him to you.

I ask unanimous consent, Mr. Chairman, that a letter of endorsement from the Association of the Federal Bar of New Jersey be inserted in the record as well.

Senator HEFLIN. Without objection, so ordered.

Senator LAUTENBERG. I thank you very much, Mr. Chairman.

[The letter referred to follows:]

OFFICERS

William B. McGuire
President

Bruce I. Goldstein
First Vice President

Joel D. Siegal
Secretary / Treasurer

Vice Presidents

John J. Barry
Frederic K. Becker
William J. Brennan, III
Dean Elizabeth F. Defeis
John T. Dolan
Douglas S. Eakeley
Gerald M. Eisenstat
S. Joseph Fortunato
Barry I. Fredericks
John P. Hauch, Jr.
Michael B. Himmel
Lawrence S. Horn
Joseph H. Kenney
Allan H. Klinger
Hon. Frederick B. Lacey
John C. Lifland
Allyn Z. Lite
William J. O'Shaughnessy
Daniel L. Rabinowitz
Laurence Reich
Richard D. Shapiro

THE ASSOCIATION OF THE FEDERAL BAR
OF THE STATE OF NEW JERSEY

550 Broad Street - 17th Floor
Newark, New Jersey 07102-4586
(201) 622-3000

ADVISORY BOARD

Hon. Clarkson S. Fisher
Hon. John F. Gerry
Hon. Stanley S. Brotman
Hon. Anne E. Thompson
Hon. Maryanne Trump Barry
Hon. Garrett E. Brown, Jr.
Hon. Arthur S. Lane
Hon. Herbert J. Stern
Hon. Anthony T. Augelli*
Donald A. Robinson
Jonathan L. Goldstein
Thomas F. Campion
Ronald M. Sturtz
John L. McGoldrick
W. Hunt Dumont
Thomas W. Greelish

*(1902 - 1985)

November 12, 1987

Hon. William (Bill) Bradley
United States Senator
Senate Office Building
Washington, D.C. 20510

Hon. Frank R. Lautenberg
United States Senator
Senate Office Building
Washington, D.C. 20510

Dear Senators:

This Association is pleased to inform you of its endorsement of the nomination of Honorable Alfred M. Wolin to be a United States District Judge for the District of New Jersey. Our Association appointed a Committee to investigate Judge Wolin's qualifications for this important position. The Committee, consisting of William J. Brennan, III, of Princeton (former President of the New Jersey State Bar Association), Jonathan L. Goldstein, of Newark (former United States Attorney for the District of New Jersey), and the undersigned, spoke with a large number of members of the judiciary as well as members of the private and public Bar. As a result of this undertaking, we are convinced that Judge Wolin will be a valuable addition to an already distinguished Bench. His intellect, wit, and penchant for work coupled with his innate ability to interface congenially with members of the Bar will, in our judgment, insure his success as a Federal Judge in our District, if he receives Senate confirmation.

We respectfully urge you to support Judge Wolin's nomination.

It should be noted that none of the Judges who serve on our Advisory Board took part in this review and, obviously, they are precluded by reason of their office from participating in this endorsement.

Very truly yours,

William B. McGuire
President

WBM:amm

Senator HEFLIN. Thank you, Senator Lautenberg.

We will be delighted now to hear from the Hon. Matthew J. Rinaldo, Congressman from New Jersey.

STATEMENT OF HON. MATTHEW J. RINALDO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. RINALDO. Thank you very much, Senator.

Mr. Chairman and members of the committee, it is a pleasure for me to have this opportunity to introduce Judge Alfred M. Wolin, of the Superior Court of New Jersey, and his wife, Jane Wolin.

I have known Judge and Mrs. Wolin for many, many years and they are both a credit to their community and their professions. Mrs. Wolin, I should point out, is the district manager for AT&T in New Jersey, as well as the mother of two children and a very close personal friend.

In examining the legal background of Judge Wolin for appointment to the Federal court, I wish to bring to the committee's attention his outstanding accomplishments as an attorney, prosecutor and judge.

He is highly respected in my home State of New Jersey, as a courageous, hard-working, highly intelligent and well informed jurist, with a background that is remarkable for the broad range of activities that Judge Wolin has been engaged in while serving as an attorney and trial judge.

During 12 years of private law practice, Judge Wolin was elected Secretary and later President of the Union County Bar Association. He also served on the Judicial Appointments Committee, screening nominations by the Governor to the New Jersey courts. He was a delegate to the New Jersey Judicial Conference, sponsored by the New Jersey State Supreme Court.

He was frequently called on to speak throughout the State of New Jersey to attorneys and the public on legal ethics. New Jersey's Chief Justice, Robert Wilantz, appointed Judge Wolin to the Statewide Speedy Trial Committee, in order to help New Jersey's courts clean up the heavy backlog of criminal and civil cases.

Judge Wolin's efforts in revising procedures to evaluate criminal calendar performance and pretrial intervention rules subsequently contributed to the improvement of the criminal justice system in New Jersey and to guaranteeing the rights of defendants to a fair and speedy trial.

As the full report on Judge Wolin's activities submitted to your committee demonstrates, he has handled a number of complex civil and criminal cases, including those involving capital crimes in a highly efficient manner. In the civil sector, he has tried all types of personal injury actions, contracts and legal malpractice cases. As the record demonstrates, Judge Wolin has been involved as a trial attorney, prosecutor and judge in many difficult cases, and appeals that have been consistently upheld on higher review.

On a personal note, my acquaintance and friendship with Judge Wolin goes back to our youth. He was an extremely bright energetic and hard-working young lawyer and served on my legislative staff during my term as a New Jersey State Senator. In 1972, when I was first elected to Congress, he joined my staff as a field repre-

sentative, attending numerous governmental and public functions in my behalf. He represented me with diligence, intelligence, and a high degree of skill in effectively communicating the public's opinions to their congressional representative in Washington.

Judge Wolin is an exceptional nominee. From my personal experience over the years and from the opinions of his colleagues on the bench and members of the New Jersey bar, it is clear that he has the judicial temperament, intelligence, courage, wisdom and integrity to sit on the Federal bench.

Indeed, I would rate Judge Wolin as one of the finest young judges nominated from the State of New Jersey in recent years, and I believe that he can contribute to relieving the burdensome caseload on our Federal judges while insuring the rights of defendants and the protection of society from criminals.

Mr. Chairman and members of the committee, thank you again for inviting me to introduce Judge Wolin and to express my enthusiastic and unqualified support for him to serve on the Federal court.

Thank you.

Senator HEFLIN. Thank you. We appreciate it.

Judge Wolin, if you will, we interrupted another proceeding, so we will come back to you and give you the oath and ask you some questions later.

Judge WOLIN. Thank you, Mr. Chairman.

Senator HEFLIN. All right, Mr. Markman, we are delighted to ask you to answer some further questions.

Senator Thurmond?

Senator THURMOND. Mr. Markman, we are glad to have you with us. We appreciate the fine service you are rendering here on the Hill and in the Justice Department and we are happy to have you here.

Mr. MARKMAN. Thank you, Senator.

Senator THURMOND. I just have one question, I think. I understand that when this matter came up about Mr. Miller with the Attorney General, only two options were presented to the Attorney General by the Deputy Attorney General, and that was either fire Mr. Miller or give him a reprimand. Is that correct?

Mr. MARKMAN. My recollection, Senator, is that firing Mr. Miller was one option that was discussed in the department. As far as those options that were formally presented by Mr. Jensen to the Attorney General, it is Mr. Jensen's recollection—and there is no contradictory documents—that the options were either not reprimanding Mr. Miller or reprimanding him. I do not think the option of actually firing Mr. Miller was one of the options explicitly presented to the Attorney General.

Senator THURMOND. I understood that the Deputy recommended one of the two, either fire him or give him a reprimand, and I just wondered if that was the information we had, I wondered if that was correct.

Mr. MARKMAN. This was not Mr. Jensen's recollection. Again, Mr. Jensen does not even recollect that this was discussed as an option at preceding meetings, but other individuals do recall that this was one of the options discussed.

Senator THURMOND. Mr. Chairman, I have another appointment I have got to go to. There are a few things I want to put in the record, if there is no objection.

Senator HEFLIN. Do you want to submit some questions, too, for the record?

Senator THURMOND. I have no other questions. I will try to get back as soon as I can for the other witnesses.

Senator HEFLIN. Your able staff person will submit whatever you need as necessary for the full record to be developed.

Senator THURMOND. Thank you.

Senator HEFLIN. Thank you.

Thank you, Mr. Markman. Did you wish to state something else?

Mr. MARKMAN. Could I make one concluding remark? I hope the committee does not believe that we are splitting hairs in trying to determine whether or not Mr. Miller responded properly to Question No. 9. In talking about "professional misconduct," the implication that many people read into that is that we are talking about ethical misconduct, we are talking about ethical improprieties. Indeed, Mr. Miller has indicated that he sees this as referring to misconduct meted out to him by professional organizations.

What Mr. Miller was reprimanded for basically was, putting the worst possible blush on it, insubordination. Again, I think there is some ambiguity in the question. Reasonable people could have responded differently, but from Mr. Miller's perspective what he was being called upon to do by the Department in the antitrust litigation was itself unprofessional. Now, whether or not the Department agrees with that, that was Mr. Miller's perspective and for him not to have signed the documents was certainly not an ethical breach on his part from his perspective but at worst a question of judgment, a question of whether or not he responded properly to his superiors.

So, we do not believe that we are sending mixed signals to the committee. If I can just summarize very clearly, the Department thinks that Mr. Miller acted improperly in the subject that relates to his reprimand. In considering Mr. Miller for a judgeship, we think that his strengths far overcome that incident, and we are very pleased and proud to have submitted him for a judgeship. Finally, we do not believe that Mr. Miller acted dishonestly or was less than forthcoming on the questionnaire, whatever the reasonable differences of opinion that some of us can have on that.

Thank you very much, Mr. Chairman.

Senator HEFLIN. As I understand it, there will be some written questions submitted and we would appreciate your prompt return.

All right, we will now have Mr. Stephen S. Trott come forward. Will you raise your right hand, sir?

Do you solemnly swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. TROTT. I do.

Senator HEFLIN. Be seated.

Would you like to introduce the members of your family or friends that are with you?

TESTIMONY OF STEPHEN B. TROTT, OF VIRGINIA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. TROTT. Briefly, Mr. Chairman, yes, I would. I am accompanied today by my wife, Sally, and my sister, Sarah, in the second row, by my staff, my principal deputy, Mr. James Knapp, my staff, Carol Lewsadder and Linda Long and some additional personal friends.

Thank you very much.

Senator HEFLIN. Let them stand up.

Mr. TROTT. Mr. Knapp, Ms. Lewsadder, Linda Long, Tony Planthara and Joe Elam.

Thank you, Mr. Chairman.

Senator HEFLIN. Thank you, sir.

Mr. Trott, in your position as Assistant Attorney General and Associate Attorney General, you were involved in a number of matters in the so-called Iran/Contra affair. Because of the seriousness of that affair, it is important that this committee be assured that there was no wrong-doing on your part in any of the matters in which you were involved. I therefore want to ask you a number of questions about these matters.

I understand from the committee staff that you have previously indicated that you would be happy to answer all of our questions on these matters in order to make the record clear, so I have a number of questions that have been prepared by the staff and others to try to get into this matter, so I will go into that.

The first area I want to ask you about in this connection concerns an investigation initiated in early 1986 by Leon Kellner, the U.S. Attorney for the Southern District of Florida, into illegal, allegedly illegal gun-running from Florida to the Contras. There have been suggestions in the media that in March or April of 1986, pressure was put on Mr. Kellner by individuals at the Department of Justice in Washington to delay the investigation. In March of 1986, you were head of the Justice Department's Criminal Division. What was your role, if any, in overseeing Mr. Kellner's investigation?

Mr. TROTT. Other than the ordinary role that the Assistant Attorney General has in connection with all matters criminal around the country, very little, with one possible exception. Mr. Lowell Jensen, at the time being the Deputy Attorney General, asked me at one point to have Mr. Mark Richard, who was one of my deputies, take a look at this case and sort of keep an eye on it. This was not at all unusual. The case itself involved foreign intrigue, ambassadors, embassies, and Mr. Richard was, as a career deputy down there, the natural person to watch that case.

I had understood from Mr. Jensen that the National Security Council was interested in this case and, really, that was the only role that I had in it. I have talked a number of times to Mr. Kellner about the allegations that he was pressured to do anything one way or the other, and from the very outset he has vigorously denied that.

Senator HEFLIN. What discussion, if any, did you have with Mr. Kellner concerning the investigation?

Mr. TROTT. The lion's share of the conversations that I had with Mr. Kellner had to do with his anger over what he considered to be false accusations that somebody had tried to tell him what to do or what not to do. He complained continuously about the press floating stories that he somehow had delayed the case, and he denied over and over again allegations that anybody, including the Attorney General or the Deputy tried to tell him what to do.

On occasion, he would simply call me up to tell me that the press had this story or somebody had asked him this question or that question, and he told me he was sick and tired of it and that, come hell or high water, he was going to handle that case routinely and do the right thing, no matter what.

Other than that, I really never got into any situations that involved instructions of how to do this or how to do that or how not to do this or how not to do that. It was almost all complaining by Mr. Kellner that it was being falsely claimed that somehow he was monkeying with the case.

Senator HEFLIN. What discussions did you have about this investigation with others in the Justice Department, including Attorney General Meese and Deputy Attorney General Jensen?

Mr. TROTT. I am sorry, I missed the very first part of that question, Senator.

Senator HEFLIN. What discussions did you have about this investigation with others in the Justice Department, including Attorney General Meese and Deputy Attorney General Jensen?

Mr. TROTT. Oh, I probably had a couple very short conversations with both the Attorney General and the Deputy after the allegations of interference had come out, during which they said almost in passing that it was nonsense, that they had never told Mr. Kellner one way or another what to do or what not to do. Occasionally, then I would report to them that Leon had called up and indicated that the press was out there again with another false story, and they just shrugged it off and went forward.

Senator HEFLIN. In March of 1986, two Federal public defenders stated publicly that they were told by an assistant U.S. attorney in Mr. Kellner's office to stop investigating the gun-running charges in Costa Rica. They were particularly concerned about this, since they had uncovered information that the recipients of the illegally transported weapons had ties to the National Security Council. Do you know anything about this?

Mr. TROTT. No, other than that I read about it in the newspaper, and Mr. Kellner once again complained to me about false stories that were floating around and continued—he has probably told me thirty to forty times that nothing like that ever happened—that he is going to handle that case in the right way, and that nobody ever tried to influence him one way or the other.

I do know that people have been brought to Washington by Members of the House and questioned, they have had hearings and all the rest, and I have never seen any information surface that this case has been handled in other than a routine fashion.

Senator HEFLIN. The two public defenders, were they involved in defending defendants or alleged defendants in this case, or do you know?

Mr. TROTT. Senator, I do not know.

Senator HEFLIN. On March 19 and 31, Assistant U.S. Attorney Jeffrey Feldman and two FBI agents traveled to Costa Rica to pursue the gun-running investigation. Did you have anything to do with the investigation at this point?

Mr. TROTT. No, other than what I have already indicated, asking Mr. Richard to take a look at it and keep an eye on it.

Senator HEFLIN. Why was a grand jury not convened after these men returned from their fact-finding trip?

Mr. TROTT. Mr. Kellner told me that the grand jury was not ready to be convened, that the case was not in the state that it was ready to go forward. He told me that during the time that he was complaining about stories that somehow it had been delayed for improper reasons.

Senator HEFLIN. On October 30, 1986, at the request of Attorney General Meese, you called then FBI Director William Webster to ask that the FBI delay an investigation of arms shipping activities by the air carrier Southern Air Transport. Questions have been raised about why the delay was requested, how long it lasted, and what was known to those requesting the delay.

Let us start with the first question. Why was a delay requested?

Mr. TROTT. The Attorney General in his office asked me to call the Director of the Federal Bureau of Investigation and see if any non-urgent aspects of the Southern Air Transport case could be delayed for approximately 10 days. I was led to believe that at that time Southern Air Transport was involved in very sensitive matters involving the national security in the Middle East and that this request had in fact come from the National Security Council and had something to do with the release of hostages on which the Federal Government was working.

As a result of being asked to do that, I called the Director of the Federal Bureau of Investigation, Director Webster, relayed that request; and that is why it was done. I was told it had to do with the release of hostages in the Middle East.

Senator HEFLIN. That was on October 30, 1986?

Mr. TROTT. I believe that is right, about a year ago.

Senator HEFLIN. What did Attorney General Meese say to you when he asked you to call Mr. Webster?

Mr. TROTT. Pretty much as I have just said, to call the Judge and ask that the case, any non-urgent aspects of the investigation be delayed, if possible, for approximately 10 days.

Senator HEFLIN. What did you say to Mr. Meese?

Mr. TROTT. At the time I believe he was also speaking out loud about the Customs aspects of the investigation also, and all I said was "all right" and went and made the phone call.

Senator HEFLIN. What did you know about the status of the FBI's investigation at the time of the call?

Mr. TROTT. I was aware of the investigation and I knew that, if anything, it was at a very preliminary stage.

Senator HEFLIN. Did you inquire of Mr. Webster what effect the delay might have on the investigation, and what did he say?

Mr. TROTT. No, he said he would check it out.

Senator HEFLIN. Was he familiar with it or did he have any comments at all, other than just checking it out?

Mr. TROTT. Not that I remember. He seemed to be generally familiar with the existence of the investigation, but not any of the details. I had none of the details, either, and I assumed that he would do what is usually done, and that is check it out with the FBI's Criminal Division.

Senator HEFLIN. Why was the 10-day delay time requested?

Mr. TROTT. I have no idea. I assumed that that would be the time during which somebody was going to be involved in getting hostages out. In fact, about 3 days after that, a hostage was released, but I do not know why the 10-day period was arrived at. I can only speculate.

Senator HEFLIN. According to a memo that Mr. Webster prepared about the conversation, you told him that the delay was needed because of some sensitive hostage negotiations. What did you think these negotiations involved?

Mr. TROTT. I had no idea, other than an attempt to free hostages, American hostages being held in the Middle East by adverse parties.

Senator HEFLIN. Did you know that the delay had been requested by Admiral Poindexter?

Mr. TROTT. At the time I do not believe I did. I only understood it had come from the National Security Council. Since that time, I have been told that it came from Admiral Poindexter, but I was not a witness to the communication from the NSC to Mr. Meese.

Senator HEFLIN. On November 10, 1986, Director Webster called you to ask whether the investigation could begin again. According to published reports, you told him you would get back to him. Is that correct?

Mr. TROTT. Yes.

Senator HEFLIN. With whom did you consult after the call?

Mr. TROTT. On the call itself, with the Attorney General.

Senator HEFLIN. What was said during your conversation with the Attorney General?

Mr. TROTT. I asked the Attorney General—I told the Attorney General that Director Webster had called, asking whether the investigation could proceed full speed ahead. He said "let me check and I will get back to you." I had two such conversations with him.

Senator HEFLIN. What happened after that?

Mr. TROTT. After the first conversation, he did not get back to me so then I brought it up again, and a few days later—I cannot remember the exact time frame—he told me to advise the FBI to proceed in any way they wished in the investigation.

Senator HEFLIN. Let me ask you this: I believe that on November 3, there appeared in a Lebanon newspaper and then shortly thereafter it became widely known, had you had any knowledge as of the time on November 10th pertaining to the fact that there was possibly a diversion, that might have been in the media, that you read or heard or seen anything pertaining to that as of that date?

Mr. TROTT. No, I do not believe that I had.

Senator HEFLIN. In the Justice Department, Terry Eastland was quoted last December as saying that the delay was quite an innocent thing, having to do with the way the bureaucracy works. Was it the result of bureaucratic delay that the investigation itself did not actually begin until November 26, 6 days after you called Mr.

Revell, I believe you called him to grant permission for the probe to resume, so was it a result of bureaucratic delay or other reasons for that?

Mr. TROTT. When the Attorney General finally did tell me that I could advise the FBI to go forward on all aspects of the investigation, Director Webster was not available so I talked to Oliver "Buck" Revell and told him to go ahead. I have since found out that it took maybe 6 days for the message to get back out to the field. That was explained to me by the FBI as just delays in transmission of the information. At that time, they told me that there was nothing urgent going on in the investigation anyway, that it was still in the preliminary stages and so it affected the investigation not one iota.

Senator HEFLIN. On November 14, you received a call from Lt. Col. Oliver North about the suspended investigation of Southern Air Transport. According to a memo prepared by Col. North, you indicated to him that you—this is from his memo—"fully understood the need not to divulge STA (Southern Air Transport) or Secord's role in support of the Iran covert action." Did you really say this?

Mr. TROTT. Well, that conversation came about when I got a call from Col. North on a secure phone. I cannot remember the exact date of the call, but he told me—the essence of his call was that it was not with respect to the FBI's investigation but with respect to the Customs' look at the same thing. He told me that the Customs people had issued subpoenas that were extraordinarily broad and covered all kinds of fully authorized sensitive matters that were best not known publicly at the present time.

I might say, by the way, that he started out with a very lengthy disclaimer that he did not want to do anything wrong, he did not want to ask me to do anything that was inappropriate, he did not want to get in the way of any investigation, and please tell him if he was doing that, but there was an extremely broad subpoena out, something involving Secord, and he would hope that the subpoena could be tailored more narrowly to address the scope of the Southern Air Transport matter, because as written it covered a whole lot of other things that Southern Air Transport was apparently involved in.

I listened, I told him that I would take a look at it, I reported it to the Attorney General, and I took no action as a result of that call. So that is what happened, and I do not know how Ollie characterized it.

Senator HEFLIN. What did you know at the time of Gen. Secord's involvement in all of this?

Mr. TROTT. I cannot remember knowing anything very extensive at all. I was very much on the sidelines, simply receiving in one case a request from the Attorney General and the other a call from Col. North.

Senator HEFLIN. Well, Col. North's notes were that you fully understood the need not to divulge STA or Secord's role is what——

Mr. TROTT. Well, I think——

Senator HEFLIN [continuing]. It indicates that you had some pretty good knowledge, if you were in a position of fully understanding the need not to divulge it.

Mr. TROTT. That may be referring to what I said to him when he said the subpoena was written so broadly that it scooped up all kinds of things that were not relevant to the investigation, and what I probably said was, "Well, I can understand that, and I will report it, but I can't do anything about it one way or the other," and then I reported it. But my indication of understanding was about concern that the subpoena was too broad, not about the activities of anybody, and I simply reported that to the Attorney General and I took no action, and I am aware of none taken by him.

Senator HEFLIN. If you do not mind, we will interrupt the questioning right now to allow Senator Gramm to come forward and introduce nominee Samuel R. Cummings, of Amarillo, Texas, and if you will bring Mr. Cummings forward, we will be delighted to hear from you, Senator Gramm.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator GRAMM. Mr. Chairman, let me thank you for your kindness. I have been over on the floor on the housing bill and I am sorry I am late. I am happy to be here with the nominee who I strongly support, Sam Cummings.

You have received written testimony from my colleague, Senator Bentsen, in support of Sam. I would like, Mr. Chairman, to ask Sam's family to stand up: Sally, Sam and Sally's son, David, and their daughter, Julie.

Mr. Chairman, Sam Cummings is everything we should be looking for in a Federal judge. He was an Eagle Scout. He graduated with high honors from Texas Tech. He ranked first in his class in business school at Texas Tech. He was an honor graduate from Law School. He has been active in numerous civic affairs in Amarillo. He is a deacon and Sunday school teacher of the First Baptist Church.

He has had a distinguished practice of law. He is broadly supported by people of all political persuasions. He has exhibited in his life from a very young age a commitment to the high standards that we hold for those who would interpret the law. He is an outstanding citizen, an outstanding student and practitioner of the law, and I strongly recommend him to this committee.

Thank you.

Senator HEFLIN. Thank you, Senator.

Mr. Cummings, we will come back for your hearing and questioning a little bit later.

Mr. CUMMINGS. Thank you.

Senator HEFLIN. Thank you, Mr. Trott, for your courteous manner in handling this interruption.

Mr. TROTT. Certainly, Mr. Chairman. If I can just elaborate on my last answer, if anything I said to Ollie, I understand your concern about a subpoena being too broad and covering things that are not really part of this investigation. I did not have the slightest idea what he was talking about in terms of other sensitive matters that had been approved and all the rest.

Senator HEFLIN. What exactly did you know of Southern Air Transport's involvement with Iran at this time? What did you know about that?

Mr. TROTT. At the time the Attorney General asked me to talk to the Director of the FBI, I had no knowledge whatsoever of Southern Air Transport's involvement in Iran. I think I had only heard of that operation in connection with Nicaragua, Mr. Hasenfuss or something like that, but I had no substantive knowledge at all about what Southern Air Transport was or was not doing. I just assumed that airplanes might be involved in getting people out. That was just my own assumption.

Senator HEFLIN. Did it occur to you at this point that there might be some connection between Southern Air's activity in Costa Rica and those in Iran as occurred to State Department Legal Advisor Sofaer?

Mr. TROTT. No.

Senator HEFLIN. According to a report in The Washington Post on November 27th, after the Attorney General's press conference in which he revealed the diversion of funds from Iran to the Contras, you were put in charge of the Justice Department's criminal investigation into the entire Iran/Contra matter. Is that report correct?

Mr. TROTT. Yes, although it implies more substance than was really involved in being put in charge of the investigation.

Senator HEFLIN. Is it also correct to say that the investigation lasted only until the appointment of Lawrence Walsh as Independent Counsel?

Mr. TROTT. That is correct, and the lion's share of the investigation really was getting things ready to be turned over to an Independent Counsel.

Senator HEFLIN. What exactly was your role in that investigation?

Mr. TROTT. My role was that of a coordinator, to make sure that things were done to preserve what was being done by the FBI when it was turned over to an Independent Counsel, and I had various meetings with people from the Federal Bureau of Investigation and various meetings with people in the Criminal Division. I was more of an administrator and orchestrator than anything else, and I did quite a lot during that time.

Senator HEFLIN. According to another report in The Washington Post, you were asked by Assistant Attorney General Weld during this time whether it would be advisable for Assistant Attorney General Reynolds to meet with the lawyer for Gen. Secord, and that you said you thought such a meeting was survivable. What do you mean by that?

Mr. TROTT. I doubt that I ever used that word. The meeting did come up, the possibility of a meeting did come up and it was our view that meetings like that should not be held, that if any lawyers had anything to talk about, that they ought to talk to the lawyers in the Criminal Division. "Survivable" is a word I do not think I have ever used.

Senator HEFLIN. When did you become aware of the White House operation to supply weapons to Iran?

Mr. TROTT. When I listened to the Attorney General describe it on television.

Senator HEFLIN. Then on October 20, when the Attorney General called you about delaying the investigation of Southern Air Transport, you were not aware of the White House's operation to supply weapons to Iran?

Mr. TROTT. That is correct.

Senator HEFLIN. Were you aware on November 14, when Col. North called you?

Mr. TROTT. No.

Senator HEFLIN. His notes indicate that Iran, I believe it says, fully understood the need not to divulge SAT or Secord's role in support of the Iran covert operation. I suppose that is his note, but you had no knowledge at that time pertaining to Iran?

Mr. TROTT. No, he said sensitive matters and I think he may have mentioned five of them. I have no recollection at all of Oliver North having used any country, including Iran, in describing those. The Middle East is I think what he said.

Senator HEFLIN. When did you first become aware of the illegal operations to supply arms to the Contras? Was it in March of 1986, when you learned of Mr. Kellner's investigation in Florida, or was it in October of 1986, when the FBI launched its investigation of Southern Air?

Mr. TROTT. The first indication I had of an administration connection with the Contras was when I heard about it on television. I was aware of all kinds of investigations that had been going on in many places about supplies of arms to the Contras, but in that connection I heard about it for the first time on television.

Senator HEFLIN. But from the grand jury activity in Florida and the Southern Air investigation, you did have, I suppose, some knowledge that there were allegations of guns being supplied to the Contras?

Mr. TROTT. Oh, yes, you could hardly pick up a newspaper without reading about that, that is correct, many people were concerned about that. There were a number of inquiries and investigations going on in various venues throughout the country.

Senator HEFLIN. When did you first become aware of the diversion of funds from Iran to the Contras?

Mr. TROTT. If you are referring to the memo found in the files of Oliver North and the White House, when I heard about it on television from the Attorney General. I was not involved in that weekend investigation. I was out of town and I knew nothing about it until I got back and saw the whole thing revealed on television.

Senator HEFLIN. Did you have any role at all in that diversion?

Mr. TROTT. No.

Senator HEFLIN. When did you first become aware of the Attorney General's White House investigation into the Iran/Contra matter on November 21–24?

Mr. TROTT. When I heard him describe it on television.

Senator HEFLIN. And as you previously testified, you had no role in that?

Mr. TROTT. That is correct.

Senator HEFLIN. Were you involved in any other aspects of the Iran/Contra affair?

Mr. TROTT. Prior to that time, no.

Senator HEFLIN. Prior to the time of the Attorney General's television revelation of it?

Mr. TROTT. Yes, and then after that only in connection with his request to me to coordinate the investigation which later turned very quickly into a delivery of it to an Independent Counsel.

Senator HEFLIN. During the hearings on Judge Bork's nomination to the Supreme Court, there was a great deal of discussion about the duty of a circuit judge to follow and apply the Supreme Court's interpretation of the Constitution. Do you believe that that is the duty of a circuit judge, in other words, or if you are confirmed will you follow and apply the Constitution as it has been interpreted by the Supreme Court?

Mr. TROTT. Yes.

Senator HEFLIN. Now, when you say you will follow and apply the Constitution as it has been interpreted by the Supreme Court, does that include the Supreme Court's pronouncements on the fourth amendment and the exclusionary rule?

Mr. TROTT. Yes, although I have been a frequent critic of it.

Senator HEFLIN. I ask you this because several years ago, in 1981, when you were a deputy district attorney in Los Angeles, you wrote an opinion piece for the Los Angeles Times in which you criticized the Supreme Court for inventing the exclusionary rule. You said in the piece that the High Court had created the rule through a "warped interpretation" of the Constitution, and that the rule was "a trash pile of contradictions, dilemmas, ivory tower dogmas and just plain nonsense." Despite what you wrote then, are you saying now that you will follow and apply the Supreme Court's pronouncements on the exclusionary rule?

Mr. TROTT. Yes, Senator, that is an article—from which you have quoted me correctly—that I furnished to this committee. I think if you will also read the lengthy piece I did after the good-faith exception to the exclusionary rule was promulgated by the Supreme Court in *Leon* and *Sheppard*, you will also get an amplified view of my ideas with respect to the fourth amendment. I am a very strong believer in the fourth amendment, the right of privacy contained therein, and I believe it ought to be upheld.

During the time that I had been a Federal prosecutor and during the time that I was a State prosecutor, I utilized the exclusionary rule frequently in a way that prevented cases from ever being filed against people. I sat in my office, we would take a look at the case, we would apply the rules and tell the police we are not filing this one, the search is no good. We did that hundreds of times.

Senator HEFLIN. As I understand, you continue to speak out about the exclusionary rule even after the Supreme Court created a good-faith exception to the rule in the 1984 cases of *United States* v. *Leon* and *Massachusetts* v. *Sheppard*. In a speech delivered to the National College of District Attorneys the day after these two cases were decided, you called on the Supreme Court to go further and extend the good-faith exception to cover not only searches conducted pursuant to judicial warrants, but warrantless searches as well. The Supreme Court has not yet chosen to take that step and thus as to warrantless searches a circuit judge still faces the precedent which you once described as a "trash pile of contradiction, di-

lemmas, ivory tower dogmas, and just plain nonsense." Are you willing to abide by the Supreme Court decisions on the matter?

Mr. TROTT. Yes, Senator. Primarily in my article, I was intending to refer to the Supreme Court of the State of California, which has undergone quite a transition since that time, and what I was referring to in my article that you have quoted from was the case of *Colorado* v. *Quintero,* which was part of the four cases on the good-faith exception series. The Supreme Court had before it the opportunity at one point to extend the good-faith exception to warrantless searches and seizures; however, unfortunately, in a number of respects Mr. Quintero died, the case was mooted and therefore was not heard as part of those four cases. But I have no problem at all as a judge in applying whatever rules are in force, and the U.S. Supreme Court, of course, is the final arbiter as to what rules will be enforced.

Senator HEFLIN. Let me ask you one other question in this area. When you say that as a circuit judge you will follow and apply the Constitution as the Supreme Court has interpreted it, does this include the Supreme Court's decision in *Miranda* v. *Arizona*?

Mr. TROTT. It includes all decisions of the U.S. Supreme Court, yes.

Senator HEFLIN. During your tenure as Assistant Attorney General in charge of the Criminal Division, you oversaw the implementation of the forfeiture provisions of the Comprehensive Crime Control Act of 1984, and in particular the development of guidelines regulating the forfeiture of fees earned by criminal defense attorneys. What transpired to cause the department to promulgate those guidelines which restricted the discretion of local U.S. attorneys?

Mr. TROTT. We had extensive discussions in the Department about the sensitivity of this problem, and in the interest of protecting the sixth amendment, in the interest of protecting the private bar, in the interest of protecting confidential attorney-client communications, in the interest of protecting those values which we thought were important, we wanted to make sure that the Department spoke only with one voice and that we did it in a very, very restricted way.

We had numbers of meetings with defense lawyers and the idea of promulgating these guidelines was to try to keep the thing as narrow as possible, still within the law, and to protect those things on the other side of the fence that really are the first interest of defense attorneys. We were afraid prosecutors might overreach, and we did not want that to happen.

Senator HEFLIN. These guidelines, according to information, did not alleviate the concern about forfeiture action among many criminal defense attorneys who continued to fear a chilling effect on client-attorney communications. They have pointed to several specific provisions in the guidelines which remain in effect today.

For instance, is it true that under the guidelines forfeitures can be triggered if an attorney acquires information about the source of his or her fees during the course of representing a client in a criminal proceeding?

Mr. TROTT. The only time that we would believe that a fee ought to be forfeited would be under circumstances where the fee would

be received by the lawyer with actual knowledge that the fee in the first instance did not belong to the client at all, that it belonged to the U.S. Government because it came as a result of criminal activity. So I think what we have tried to do is make it clear that we are not out there trying to take things away from lawyers that they have gotten with the good-faith belief that the client was entitled to use that to pay the fee.

As far as I have been told—and we continue to meet regularly with lawyers on this subject—generally, they are very pleased with where we are in these guidelines. But in addition to the guidelines, what I also did was assign a very special responsibility to one of my deputies, a man named William Landers. When I was in the Criminal Division and now again in the Associate's office, we let defense lawyers know around the country that in case they ran into any situation where these guidelines were not being followed, number one, or where the Department of Justice was overreaching and interfering with some substantial value, number two, that Mr. Landers could be called and he personally would iron it out. I have been told on many occasions by defense attorneys that that system has worked extraordinarily well and as a matter of fact they are very pleased with our attention to their concerns. The latest was after the ABA Criminal Section meeting in San Francisco, where the Attorney General and I both were told that the defense attorneys in general were extremely pleased with our responsiveness to their concerns.

Senator HEFLIN. During your years as Assistant Attorney General and Associate Attorney General, you have been involved in a number of controversial prosecutorial decisions. I want to ask you about some of these decisions today, not because I necessarily disagree with the decisions but because they reflect on your exercise of judgment and your commitment to equal justice.

To be specific, in November of 1985, when you were Assistant Attorney General in charge of the Criminal Division, you participated in the decision to indict General Dynamics and four present and former executives for cost mischarging on a $40 million defense contract. Is that correct?

Mr. TROTT. Yes. Well, I was in the chain. The decisions were actually made in California by the U.S. Attorney's Office and the trial lawyers in the Fraud Section people. I was in the Criminal Division at that time.

Senator HEFLIN. What was your personal involvement in the decision to proceed with that indictment?

Mr. TROTT. I had been briefed by Robert Ogren, the Chief of the Fraud Section, early on in that investigation regarding what the investigation entailed, what the allegations were, what the state of the evidence was, what the proof was, and with respect to his views that there was in fact, there had in fact been a crime committed by General Dynamics and that the evidence, as it was beginning to come together, so indicated.

The only thing I did was receive information from Mr. Ogren and encourage him to proceed forward expeditiously and resolve the case. I was not part of the indictment review committee or the group that made the decision to go forward in the case. That was

all done in California at a meeting with Fraud Section lawyers, assistant U.S. attorneys, supervisors and the U.S. attorney.

Senator HEFLIN. At the time of the decision to indict, were you aware that there was language in the General Dynamics contract that suggested that there had been no mischarging at all in this case?

Mr. TROTT. No.

Senator HEFLIN. It was not reported to you that one of the General Dynamics California lawyers had vigorously argued this to the person who was the head of the Fraud Division?

Mr. TROTT. I had been told that there had been maybe—certainly one, maybe more, meetings in California during which the defense argued on the other side that this was a case that should not go forward. I did not get into the details of it. It was reported to me as a standard meeting where the defense lawyers said "we did not do it" and our lawyers said "yes, you did."

Senator HEFLIN. The department later dismissed the indictment in that case, based in part on the language of the contract and on documents that had been previously overlooked. Is this correct?

Mr. TROTT. Well, it had not been previously overlooked. The language that I am told now had been spotted earlier but it had been explained away by people who should have been in a position to know what it meant, and I think you are referring to the "best efforts" language. People had been told previously, according to what they told me, that that was nothing more than throw-away language, "best efforts" meaning do your best.

I did not know and we did not know until after a careful review after the indictment that this had a technical meaning and in fact a lot of information came to our attention in the Justice Department after the indictment that we did not know beforehand. In some instances we probably should have, in view of the requests that we made of the Department of Defense for additional information on the case.

Senator HEFLIN. There will be other questions that will be submitted to you and we hope that you will give them prompt response, and Senator Thurmond will submit some questions to you, and Senator Metzenbaum and Senator Simon will submit some questions.

[The questions and answers referred to follow:]

U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

November 16, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Dirksen Senate Office Building
Room 212
Washington, D.C. 20510-6275

Dear Senator Biden:

In connection with my nomination to the Ninth Circuit Court of Appeals, I have enclosed my responses to the questions that Senator Leahy requested today.

Sincerely,

Stephen S. Trott

Enclosure

Additional Questions for Stephen S. Trott

1. At the Committee's hearing, you were asked about your involvement in promulgating the Justice Department's Guidelines on attorneys' fees forfeiture. Since you have become Associate Attorney General, the Department has been developing a new set of guidelines, these regulating the prosecution of attorneys under the new federal money laundering statute. Have you been involved with that process?

Answer: I have been involved in this process. Both sets of guidelines have been worked on extensively by my deputy William Landers. My essential input was to make sure that extensive discussions were had with defense attorneys and the American Bar Association to insure that the Sixth Amendment, the attorney-client privilege, and the attorney-client relationship were respected and preserved. I also took steps to make sure that control of the statutes and process and decision-making was placed in Washington to avoid overreaching by United States Attorneys and to promote uniformity throughout the Country.

2. These new guidelines, which are still in draft form appear to take a different approach from the forfeiture guidelines to the issue of an attorney's knowledge of the source of his or her fees. For instance, the new guidelines state: "the Department recognizes that attorneys [involved in the representation of criminal defendants], unlike all others who may deal with criminal defendants, may be a breach of ethical standards or may result in a lack of effective assistance to the client."

Unlike the guidelines on attorneys' fees forfeiture, these new guidelines also provide:

1) that, in order to proceed with an action against an attorney, a prosecutor must have "proof beyond a reasonable doubt" that the attorney had actual knowledge of the illegal origin of the specific property received;

2) that an attorney's knowledge of the illegal source of property must have "pre-existed representation on the particular matter or [have been] gained independent of the

attorney-client relationship on that matter"; and

3) that allegations in the government's indictment cannot be used as evidence of an attorney's knowledge of illegal origin, nor can a client's voluntary statements unless "there is other evidence that establishes beyond a reasonable doubt that the attorney had actual knowledge."

What is the reason for the change in approach between the attorneys' fees forfeiture guidelines and these new guidelines?

Answer: In many respects, the intent of the guidelines is the same, ie., to enforce the law even-handedly and to do so with respect for the various interests involved. Both sets require actual knowledge and both give great deference to the Sixth Amendment's right to counsel, the attorney-client privilege, and the attorney-client relationship.

The differences relate primarily to the interests at stake. In the area of fee forfeiture, the loss of the fee--because it never belonged to the defendant in the first instance due to the relation-back doctrine--results in the defendant being represented by the public defender or appointed counsel. In the area of money laundering, the question is whether or not a lawyer shall go to jail as the result of his financial dealings with his client. It is the view of the Department that the possibility of prosecution--not just the loss of a fee--justifies the use of stricter standards.

3. Do you have any substantive disagreement with these new provisions? If not, have you come to a new view on the issue of attorney-client communications that you will take with your to the bench?

Answer: The new money laundering guidelines are still in draft form. We are still engaged in extensive dialogue with the

American Bar Association and defense attorneys on the particulars. I fully support the idea that the guidelines must be carefully drawn to protect the legitimate interests of defendants and their attorneys. I will not support any approach that does not. In fact, I have been one of the primary instigators in this consultative process.

I have always had great respect for the attorney client privilege, the Sixth Amendment, and the role of the private bar in the defense of those charged with crime. I will carry this respect with me to the bench. The process that you have observed, in all candor, is the result of my pre-existing sensitivity and appreciation for the relationship. I have not learned anything new in the process. My view that it is a good idea--indeed essential--to consult with defense attorneys has only been confirmed. I have attached a letter from Mr. Albert J. Krieger, who has represented the criminal defense bar in this consultative process, as a corroborating exhibit.

4. Isn't it true in the context of both civil forfeiture and criminal prosecution that an attorney who fails to properly investigate the facts of a matter entrusted to him may be breaching his ethical obligations?

Answer: Although this is true as a general proposition, our interests as prosecutors are somewhat different. We do not impose a "duty to inquire" upon defense attorneys, and we have made provisions to protect defense attorneys who have proceeded in good faith. We are attempting to do our best to accommodate all their concerns. Congress did not exempt attorneys from the

reach of the new law. It is our job, however, in the promulgation of guidelines to make sure that in the application of the law, we proceed with caution, fairness, and appropriate sensitivity.

5. Your wife is, by profession, a political consultant and fundraiser. Have you given any thought to what conflicts of interest that may present in your work on the federal bench? In particular:

a. Will you recuse yourself from cases in which one of your wife's clients is a party?

b. If your wife were to do political fundraising for a successful candidate for state Attorney General, would you recuse yourself from cases involving that Attorney General or his office?

c. If your wife were to do political fundraising for a successful candidate involved in a race for statewide judicial office, would you recuse yourself from cases (such as habeas corpus cases) in which you might be called upon to review decisions of the judge involved?

Answer: I have discussed this issue at length with my wife. We have determined that we will conduct our affairs very carefully to avoid actual conflicts of interest as well as the appearance thereof. I would certainly recuse myself from any case wherein a conflict or the appearance of a conflict does exist. This recusal policy would most certainly include any case in which any of my wife's clients was a party or a state Attorney General responsible for the case. As to judicial candidates, my wife does not do that kind of work and does not intend to in the future. I foresee no problems in this area.

6. Prior to last summer, when you assumed your current position as Associate Attorney General, what was your experience in noncriminal areas of the law?

Answer: My experience in non-criminal areas of the law has been gained handling 1) family law matters (child support cases) for the County of Los Angeles and 2) civil matters between 1981 and 1983 as the United States Attorney for the Central District of California. I also became fairly conversant with federal civil procedure as the result of extensive involvement with civil forfeiture process pertaining to drug cases and civil RICO as it has been used against labor racketeering.

7. Do you have a developed philosophy of constitutional interpretation outside of criminal law issues? Do you believe in interpreting the Constitution according to its "original intent?"

Answer: I have not yet been called upon as a judge to engage in the interpretation of the Constitution. I have thought about the task, however, since my nomination. I do believe that the Constitution should be applied in terms of the basic principles contained therein as spelled out in Supreme Court precedent. Original intent in that regard is an important element in the equation, but the original intent of the framers must be understood and applied in contemporary terms.

As stated in my questionnaire, the essential task of a judge in the discharge of his or her official duties is to interpret and apply the law of the land--be it found in the form or a statute or a constitutional mandate--in a manner that accords full respect to 1) the language and plain meaning of the text in question, and 2) the discernible intent, purpose, and spirit with

which it was enacted; and 3) legal precedent. Conversely, it is not the role of a judge either to make law where none exists, or to alter or ignore it where it runs counter to the judges own personal beliefs. I would agree with Justice Brennan's thought that "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections."

My affinity for "judicial restraint," as contrasted with "judicial activism", however, does not mean that I believe that a judge's head must of necessity be buried in the sands of yesteryear. The Constitution is a resilient and flexible document expressing enduring principles that can easily accommodate features of twentieth century life that were unheard of when the Constitution was drafted. The court-sanctioned electronic surveillance of certain activities of criminals is a good example of this adaptiveness. It is my view that judicial restraint does not dictate a crabbed view of the law which looks only to the past for solutions to present problems of constitutional dimension. I would also note in this vein that certain decisions of the Supreme Court that stood for years as "the law of the land" in retrospect have not added to the luster of our distinguished history. It must never be forgotten that the Supreme Court at various times has effectively sided with slavery, denied that the franchise to women, approved the segregation by race of children attending public schools, and sanctioned the forcible relocation and internment of innocent citizens of Japanese ancestry during World War II. In this

regard, a judge must always be vigilant to insure that the law in all of its respects remains healthy, viable, and true to the basic constitutional values upon which our nation was founded.

I believe also that a judge ought to take care to respect the prerogatives of the executive and legislative branches of government, taking care not to invade inappropriately that part of the domain of democratic government in which certain decisions are left to the people to be made by their elected representatives. It is very important in this respect for a judge to understand and to respect the doctrine of separation of powers and the system of checks and balances set forth in the constitution itself.

8. The Committee has received a report that when you were a Deputy District Attorney in Los Angeles, you instructed the other Deputies in your office to move to request disqualification in all criminal cases that came before a trial judge named Bernard Selber. Can you explain the circumstances and why you would have given such an instruction?

Answer: California law --unlike federal law-- permits litigants to exercise preemptory challenges against trial judges without any reason. See Cal. Code of Civil Procedure §170.6. The devise is commonly used both by prosecutors and defense attorneys. The guidelines of the District Attorney's office restricted the use of this preemptory affidavit to situations wherein the supervising attorney--in this case me--came to the informed conclusion based on a clear pattern of conduct that a fair hearing could not be had before a certain judge. Judge Selber over and over again suppressed evidence in criminal cases

resulting in the dismissal of criminal charges against dangerous people. My deputies believed sincerely as did I that Judge Selber was misapplying the law. Upon refiling, other judges hearing the same matters determined that the evidence in question was admissible, and convictions were promptly obtained. Judge Selber also released a dangerous convicted rapist on bail pending appeal. Shortly thereafter, the rapist attacked and tried to kill another victim. I convicted him for that heinous crime. Consequently, at the request of my deputies, I approved the blanket use of §170.6 against Judge Selber as permitted by law. In my view, it was a matter of public safety. This blanket approval was also used by the public defender's office against other judges on occasion when they determined that their clients could not get a fair hearing before certain judges.

Judge Selber and I remained on cordial terms after this event which reflected my professional judgment.

9. The attached document was released during the course of the joint House-Senate investigation into the Iran-Contra affair. In it, you appear to have asked your assistant, Mark Richard, to look into an investigation that was being conducted by U.S. Attorney Leon Kellner in the Southern District of Florida. Can you explain what you meant in this memo when you wrote that "D.L.J." was giving a "heads up" to the NSC about the matter? Why was Mr. Jensen talking to the NSC about Mr. Kellner's investigation?

Answer: The investigation in question related to foreign intrigue and matters colorably imposing on the national security. It involved numerous foreign countries and all sorts of allegations involving weapons, plots, ambassadors, etc., as you can see from the unredacted Revell to Jensen memo of March 20,

1986. Mr. Jensen told me that he had been asked to inform the N.S.C. with respect to the dimensions of the case, precisely why, I'm not sure. The request at the time, however, did not seem unusual given the facts. Other than that, I do not know why he was talking to the N.S.C. about the investigation.

Mark Richard is a senior career Deputy Assistant Attorney General in the Criminal Division with personal jurisdiction over terrorism, espionage, internal security, the export control statutes, and the Office of International Affairs. He is frequently called on to advise U.S. Attorneys in sensitive areas where his considerable experience is invaluable. No sinister motive should be inferred from this assignment. Mr. Richard performs this service on many complicated cases involving foreign countries.

I am aware of no effort by the N.S.C. or Mr. Jensen to "control" the outcome of the case or the investigation.

DECLASSIFIED

ROUTING AND TRANSMITTAL SLIP Date 3/24/86

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. MARK RICHARD		
2.		
3.		
4.		
5.		

Action	File	Note and Return
Approval	For Clearance	Per Conversation
As Requested	For Correction	Prepare Reply
Circulate	For Your Information	See Me
Comment	Investigate	Signature
X Coordination	Justify	

REMARKS

PLEASE GET ON TOP OF
THIS. D.C.J. IS GIVING A
HEADS UP TO THE N.S.C.
THEY WOULD LIKE US TO
HANDLE IT.
CALL KELLNER, FIND OUT
WHAT IS UP, AND ROUTINE
HOW THAT DECISIONS SHOULD BE FORWARDED.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.	
STEPHEN S. TROTT ASSISTANT ATTORNEY GENERAL CRIMINAL DIVISION	Phone No.	

5041-102

OPTIONAL FORM 41 (Rev. 7-76)
Prescribed by GSA
FPMR (41 CFR) 101-11.206

GPO : 1985 O - 461-284 (435)

DECLASSIFIED

~~SECRET~~

The Deputy Attorney General March 20, 1966

Oliver B. Revell
Executive Assistant Director
Investigations

[redacted]

NEUTRALITY MATTERS -

INFORMATION MEMORANDUM

The entire contents of this memorandum are classified "Secret."

[redacted]

U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

November 16, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Dirksen Senate Office Building
Room 212
Washington, D.C. 20510-6275

Dear Senator Biden:

At the conclusion of my Judiciary Committee hearing in connection with my nomination to the Ninth Circuit Court of Appeals, I was given certain questions to be answered in writing for Senators Thurmond, Metzenbaum, and Simon. Enclosed are my responses.

Thank you for your consideration.

Sincerely,

Stephen S. Trott

Enclosures

Questions from Senator Strom Thurmond to Stephen S. Trott

Question 1

Mr. Trott, one of the characteristics of judicial activism is said to include a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities. Would you give the committee your views on this criticism?

Answer

The essence of the role of a federal judge is to interpret and to apply the law of the land in the resolution of genuine cases and controversies properly before his or her court. It is not the role of a judge or the judicial branch of government to exceed the bounds of its own authority as in the case of assuming administrative responsibilities for other autonomous institutions unless such temporary administrative control is necessary to insure that there is compliance with the law.

Ordinarily institutions ought to be left to their own devises unless there is a clear indication that temporary supervision and monitoring is required to insure that a lawful judgment of the court is fully carried out. One example of such appropriate supervision would be a situation in which the elected and appointed officials of a school district or a police department were found to have engaged in systematic, intentional and unlawful discrimination against members of a certain race or religion. A federal judge most certainly would be justified in assuming some control over the plan and process by which such

unlawful conduct would be remedied. Such control should be promptly returned to the appropriate authorities responsible for the governance of the institution, however, as soon as the institution demonstrated an ability to run itself without violating the laws at issue in the case.

Question 2

Mr. Trott, there is frequently a conflict between the deeply-felt constitutional views of a federal judge and the constraints of judicial precedent. How would you resolve the tension between personal jurisprudence and precedent?

Answer

The essential task of a judge in the discharge of his or her official duties is to interpret and apply the law of the land--be it found in the form of a statute or a constitutional mandate--in a manner that accords full respect to 1) the language and plain meaning of the text in question, and 2) the discernible intent, purpose, and spirit with which it was enacted; and 3) legal precedent. Conversely, it is not the role of a judge either to make law where none exists, or to alter or ignore it where it runs counter to the judge's own personal beliefs. I would agree with the thought that "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections."

My affinity for "judicial restraint," as contrasted with "judicial activism", however, does not mean that I believe that

a judge's head must of necessity be buried in the sands of yesteryear. The Constitution is a resilient and flexible document expressing enduring principles that can easily accommodate evolving features of twentieth century life that were unheard of when the Constitution was drafted. The court-sanctioned electronic surveillance of certain activities of criminals is a good example of this adaptiveness. It is my view that judicial restraint does not dictate a crabbed view of the law which looks only to the past for solutions to present problems of constitutional dimension. I would also note in this vein that certain decisions of the Supreme Court that stood for years as "the law of the land" in retrospect have not added to the luster of our distinguished history. It must never be forgotten that the Supreme Court at various times has effectively sided with slavery, denied that the franchise to women, approved the segregation by race of children attending public schools, and sanctioned the forcible relocation and internment of innocent citizens of Japanese ancestry during World War II. In this regard, a judge must always be vigilant to insure that the law in all of its respects remains healthy, viable, and true to the basic constitutional values upon which our nation was founded.

In the final analysis, however, a judge at the circuit court level is bound by Supreme Court precedent and must accord superior weight to that authority.

Questions from Senators Howard Metzenbaum and Paul Simon to Stephen S. Trott

Question 1. YOU HAVE ARGUED THAT THE RICO STATUTE MAY ALLOW THE GOVERNMENT TO PLACE A LABOR UNION UNDER COURT SUPERVISION. WHAT STANDARDS GUIDE THE DEPARTMENT OF JUSTICE'S DETERMINATION WHETHER TO SEEK SUCH RELIEF?

1. The Department of Justice has implemented very careful procedures within the Criminal Division for the review of all RICO cases--criminal and civil--filed by the United States. Before the government files a § 1964(a) action--the civil RICO provision to which your question is addressed--we must have strong, credible evidence that the enterprise in question operates under the influence of racketeers. If alternative options, such as criminal prosecutions or remedies available under other civil statutes have proved or are likely to be inadequate to remove racketeer influence from an enterprise, we will use civil RICO.

In this regard, there are several important points to keep in mind. First, when Congress enacted the civil RICO statute in 1970, it clearly and explicitly intended that civil RICO would be used to remove criminal elements from labor unions, where criminal prosecutions had failed to do the job. Second, it is the court, not the government, that determines what relief under § 1964(a) will be imposed, and to what extent. As with all suits based in equity, the court fashions its relief within that which is legally appropriate to cope with the harm at hand. Third, to demonstrate the care with which the Department uses § 1964(a), we

have filed only three such cases in which a labor union was a defendant or enterprise, in contrast to approximately three hundred criminal RICO prosecutions brought by the government in the last three years. Many of those prosecutions involved labor offenses where civil RICO suits technically could have been filed but which, in our discretion, were unnecessary.

And last, the results in the three cases to which I alluded involving Laborers Local 6A [1], and Teamsters Locals 560 [2] and 814 [3] dramatically demonstrate that our standards have been high and thoroughly justified.

Question 2. UNDER WHAT CIRCUMSTANCES DO YOU BELIEVE IT WOULD BE APPROPRIATE FOR THE DEPARTMENT TO SEEK A TRUSTEE FOR A NATIONAL OR INTERNATIONAL UNION, RATHER THAN FOR ONLY ONE OR MORE LOCAL AFFILIATES?

2. Whether a § 1964(a) action should be brought does not turn on the size or location of the enterprise, no more so than confining RICO to a particular industry or activity. Under our principles of due process, the laws should apply equally to all

---

[1] United States v. Local 6A, Cement and Concrete Workers, Laborers International Union of North America, No. 86 Civ. 4819 (VLB) (S.D.N.Y. filed June 19, 1986).

[2] United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986).

[3] United States v. The Bonanno Organized Crime Family, No. CV-87-2974 (E.D.N.Y. filed August 26, 1987).

segments of society. If an enterprise, be it a labor union or a restaurant [4/], is so under the influence of racketeers that RICO sanctions reasonably provide the only effective remedy, a § 1964(a) action is appropriate. Where such circumstances exist, Congress intended RICO to be used. Of course, I should add, that the rights and interests of innocent third parties--such as employees of the enterprise--must always be assessed and protected before and after a RICO case is filed. In the three cases noted above, the rights of the rank and file members to an honest union had been diminished or even completely destroyed; RICO was the only way to restore those rights.

Question 3. HOW WOULD THE APPOINTMENT OF A TRUSTEE ALLOW FOR THE INDEPENDENT FUNCTIONING OF A UNION IN PURSUIT OF LEGITIMATE COLLECTIVE BARGAINING GOALS? FOR EXAMPLE, HOW COULD A COURT-APPOINTED TRUSTEE FAIRLY REPRESENT THE INTERESTS OF UNION MEMBERS IN DECIDING WHETHER TO SEEK BETTER TERMS AND CONDITIONS OF EMPLOYMENT OR TO INITIATE A STRIKE?

3. We believe that the results in the Local 814, 6A, and 560 cases demonstrate that a court appointed trustee can balance his duties to eradicate mob influences while permitting the union to function effectively. The very reason for appointing a trustee of any enterprise is to protect and represent the interests of its members while correcting the conditions that created the need for a trustee in the first place. In the 814 and 6A

[4/] See, e.g., United States v. Ianniello, No. 86 Civ. 1552-CSH (S.D.N.Y. filed February 12, 1986).

cases, the parties themselves were able to strike the necessary balance. In 560, where the trial record demonstrated a critical need for a full trusteeship, we are advised that Edwin Stier, the trustee, is effectively and aggressively supervising Local 560 in its collective bargaining activities. In fact, for the first time in two decades, Local 560's rank and file can be confident that Local 560's leadership is not accepting bribes from management in return for sweetheart deals that sell out the membership. Ultimately, as with any trusteeship, a RICO trustee operates as a fiduciary of union members and is responsible to the court for the success of the enterprise.

Question 4. WHAT MEASURES CAN BE INCORPORATED IN SUCH COURT SUPERVISION TO PRESERVE TO THE GREATEST EXTENT POSSIBLE THE RIGHT OF WORKERS TO FREELY ASSOCIATE, CHOOSE THEIR REPRESENTATIVES, AND BARGAIN FREE FROM UNNECESSARY COURT SUPERVISION? SHOULD SUCH COURT SUPERVISION BE LIMITED TO THOSE UNION ORGANIZATIONS WHICH ARE CRIMINALLY INFLUENCED AND LEAVE LOCALS FREE FROM CRIME FREE FROM COURT SUPERVISION?

4. As I stated previously, before any relief can be imposed by a court under § 1964, the court must first find that the defendants engaged in or facilitated a pattern of racketeering. Furthermore, all equitable relief, such as an injunction under § 1964(a), should and must be tailored to prevent continued racketeering activity within the enterprise without adversely affecting innocent employees and legitimate activities of the enterprise in question.

In the Local 814 case, a prior RICO prosecution demonstrated beyond a reasonable doubt that Teamsters Local 814 was infested by organized crime figures. The parties to the civil RICO suit, which was filed by the government in an effort to prevent the return of these mobsters to their former union positions, were able to agree on selection of a trustee and the scheduling of elections. At the same time, an agreement was reached which allows the union to conduct its normal business. The trustee has the right, of course, to monitor the union's activities at all times in order to prevent the re-emergence of criminal influence.

Similarly, in 1986, a RICO criminal prosecution in Manhattan demonstrated that New York's five organized crime families controlled the concrete construction industry in New York City through Local 6A of the Cement and Concrete Workers Union. In the Local 6A civil RICO case, the government and the union again were able to agree on the appointment of a trustee, the scheduling of elections, and a plan for the continued operation of the union.

I have enclosed the Local 814 and Local 6A consent decrees to demonstrate even in hotly contested cases of this type, that the parties and the court were able to strike a proper balance between the union's need to conduct its legitimate activities and society's need to expel mob influence from the labor movement. Whether or not the parties can agree to a settlement, the court,

not the government, ultimately determines what remedies will best protect the rights of the union members.

Question 5. AS A FEDERAL JUDGE, WHAT STANDARDS DO YOU BELIEVE SHOULD GUIDE A JUDGE IN DETERMINING WHETHER SUCH RELIEF IS APPROPRIATE?

5. In order to implement relief under § 1964, a judge must first find, by a preponderance of the evidence, that the defendants engaged in a pattern of racketeering activity. In addition, the judge must determine what steps must reasonably be taken to terminate such racketeering and prevent its future recurrence. In this respect, § 1964 is similar to any action in equity where the court is asked to prevent continued wrongdoing.

Finally, let me observe, that Congress has wisely drafted the RICO statute to give courts the necessary flexibility to do as little or as much as circumstances require to separate racketeers from legitimate enterprises. Like a cancer, some cases will merely require minimal preventive steps; more extreme cases may require surgery. And, to continue with the medical analogy, the doctor must release the patient as soon as the patient is cured.

U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

December 2, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Dirksen Senate Office Building
Room 212
Washington, D.C. 20510-6275

Dear Senator Biden:

In connection with my nomination to the Ninth Circuit Court of Appeals, I have enclosed my response to the additional question that Senators Metzenbaum and Simon requested today.

Sincerely,

Stephen S. Trott

Enclosure

Additional Question from Senators Howard Metzenbaum and Paul Simon to Stephen S. Trott

Question 2. UNDER WHAT CIRCUMSTANCES DO YOU BELIEVE IT WOULD BE APPROPRIATE FOR THE DEPARTMENT TO SEEK A TRUSTEE FOR A NATIONAL OR INTERNATIONAL UNION, RATHER THAN FOR ONLY ONE OR MORE LOCAL AFFILIATES?"

2. Let me start out by again emphasizing that our civil RICO suits against labor racketeers have always been, and will be, filed on behalf of victimized rank and file union members, who are the real beneficiaries of these suits. We are making every effort to remove racketeers from these unions, leaving the members free to resume their legitimate goals. This is the mandate given to the Department of Justice in the Organized Crime Control Act of 1970, in which Congress specifically found that the "money and power [of organized crime] are increasingly used to infiltrate and corrupt legitimate business and labor unions."

I believe that the government should rely on trustworthy and probative direct evidence wherever possible to demonstrate that an international union's affairs have been and continue to be influenced by criminal acts, if that be the case. Furthermore, before seeking to have any enterprise, let alone an international union, placed under trusteeship, there should be credible, highly relevant evidence that a pervasive pattern of racketeering has occurred substantially affecting the integrity and important functions of that international union. Sporatic and isolated acts of individuals are not enough.

As you know, the law makes no distinction between the value of direct and circumstantial evidence, nor does the standard of proof change in a civil RICO case depending on the size or importance of the victimized enterprise. Having said that, it is obvious that a court-imposed trusteeship has a significant impact on the legitimate functions and honest employees of an international union. For this reason, all of our civil RICO cases to date involving labor unions have been based in part either on credible insider, eye-witness testimony, or upon electronic surveillance or documents providing a high degree of reliability. Further, I firmly believe that such evidence must demonstrate, before a trusteeship is sought, that less intrusive remedies would fail to remove the influence of racketeers from the international union. Even then, the government would seek, on behalf of the rank and file, to tailor carefully the trustee's duties and powers to removing that pernicious influence, leaving uncontaminated affairs of the international union to its normal processes.

Senator HEFLIN. Thank you very much. We appreciate your cooperation.

Mr. TROTT. Thank you very much, Mr. Chairman.

Senator HEFLIN. We will call Judge Alfred M. Wolin, if you will come forward.

Judge Wolin, if you would raise your right hand and take the oath: Do you solemnly swear that the testimony you will give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge WOLIN. I do, Mr. Chairman.

Senator HEFLIN. Have a seat, sir.

Judge WOLIN. Thank you.

TESTIMONY OF HON. ALFRED M. WOLIN, OF NEW JERSEY, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

Senator HEFLIN. During the 1982–83 period, you presided over civil cases in the New Jersey Superior Court. You initiated a program to encourage the settlement of cases. Please describe the program and summarize the results.

Judge WOLIN. That program was an acronym for Come And Settle Early. What happened was that I would send a letter out to a specific docket of cases, we would bring in 20 cases every Monday, we would hold settlement conferences on those cases, and those cases we could not settle would be then sent out to a judge as well as myself to try those cases.

They were sent an order in advance, along with a letter, telling them what degree of preparation would be necessary, if they had a doctor that was not available, take depositions in advance, adjournments would only be given by consent of the court. It was a very successful program, Mr. Chairman.

Senator HEFLIN. What is the proper role of a Federal judge in encouraging pretrial settlements, particularly in complex cases?

Judge WOLIN. Well, Mr. Chairman, whether it be a Federal or a State judge, a judge has only so much impact in the settlement of cases. I have always had great respect for the lawyers that appeared before me. They know the case better than I do. I am there,if they seek my counsel or the counsel of my magistrate, to assist in a settlement negotiation, but I am not there to push settlement, I am there to engage in dispute resolution.

There are certain matters, Senator, that must be tried and I recognize that.

Senator HEFLIN. Is it possible for a judge to be too aggressive in encouraging pretrial settlements, and how may a judge best guard against this potential danger?

Judge WOLIN. A judge can be too aggressive in pretrial settlement, and I think that the judge has to have a firm understanding of the process of litigation, understanding, as I have, having been a litigator in my past, that there are certain matters that must be tried before a court and each litigant is entitled to have their day in court.

Senator HEFLIN. What has been your approach to managing the criminal case docket in the New Jersey Superior Court? What steps have you taken to balance the rights of the parties to a criminal

proceeding against the need for speedy trial and the administrative pressure to clear the dockets?

Judge WOLIN. Since I have been the presiding judge of the criminal courts in my county, we have engaged in what we call management matrix. It is a formula. Good case management means employing good people and good techniques, engaging in scheduled events, being sure that a case always has a scheduled event, engaging in the use of computers, and other advanced technology. But once again, sir, understanding that each litigant has a right to a trial, nobody is forced to plead, as long as you have scheduled events and people understand what dates and commitments they have, they have a right to a trial or a plea, whatever they choose.

Senator HEFLIN. In one instance in 1982, it appears that you may have been overzealous in your efforts to expedite criminal trials. You were reprimanded by the New Jersey Supreme Court for your action in ordering the arrest of a public defender who failed to appear for trial on grounds of illness. What did you learn from this instance that you will take with you to the Federal bench?

Judge WOLIN. Mr. Chairman, from all the materials that I have submitted to you, you understand that that event was a very painful experience in my life. I have never been involved in anything like that. Up until that date, I have never been involved in anything like that in the past.

The experience of that is that there are better ways to deal with a problem. The matters that I deal with now do not require the immediacy of the action I took. The conduct of the lawyer today would be no less offensive or inimicable to the advancement of the criminal justice system, but what is different today is the judge and I as a presiding judge have counseled judges who are now under my supervision, when they have had a problem, I wish I had had the opportunity for the counsel that I sought back in 1982.

Senator HEFLIN. You have presided over several murder trials in which the death penalty was an authorized punishment under New Jersey law. What special problem does the death penalty case present to a trial judge, and in particular how have you managed voir dire of prospective jurors in these cases?

Judge WOLIN. I think that initially—I am about to teach a course in 2 weeks how to prepare and try a capital case. I think what is very important initially is preparation, in having appropriate questionnaires for your voir dire. My questionnaire initially consists of 54 questions, I then have supplemental questions.

I published an opinion very recently where I did not apologize for the time spent in voir dire where one's life is forfeit to make sure that people that are selected are fair and impartial jurors.

Senator HEFLIN. It is my understanding that both prosecutors and defense lawyer have praised you for your careful voir dire in capital cases. New Jersey law permits attorney participation in voir dire in capital cases, but attorneys have rarely found it necessary to intervene actively. You also have to handle challenges to the press' access to the voir dire in capital cases and the media to come in. Your bench manual for death penalty cases is used by fellow judges when such cases come before them, so I think you are to be commended for that.

As a State court judge, you have sentenced hundreds of convicted defendants. What is your sentencing philosophy?

Judge WOLIN. View each defendant as an individual, sentence them fairly and impartially, sentencing according to the guidelines of the State of New Jersey, understanding that when a judge varies from the guidelines that are provided to him, he becomes a vigilante and he does not follow the law, and I feel it is important that in sentencing that every judge follow the law.

Senator HEFLIN. You are certainly an experienced litigator with the State court system, but your questionnaire response indicates that only one percent of your court appearances were in Federal court. Do you think that your lack of Federal court experience will handicap you in your service as a U.S. district judge, and, if so, how do you plan to overcome that handicap?

Judge WOLIN. I really do not feel any handicap, Mr. Chairman. I feel that in my 7½ years as a judge and with my prior trial experience, I feel familiar and comfortable in the courtroom. Yes, I am going to have to learn a new set of rules, but I have done that before and I really do not feel any sense of handicap. I feel comfortable.

Senator HEFLIN. Are there any other people present that you would like to introduce?

Judge WOLIN. Yes, thank you. I would like to introduce my wife. My wife, Jane, is sitting here, she is my better half, Mr. Chairman.

Mrs. WOLIN. It is a pleasure and a privilege to be here. Thank you.

Senator HEFLIN. Is there anybody else that you wish to introduce?

Judge WOLIN. No.

Senator HEFLIN. Thank you, sir. We appreciate your cooperation in answering.

Judge WOLIN. I would like to thank——

Senator HEFLIN. Senator Thurmond will have some questions and he will submit them in writing to you and we would appreciate your prompt response.

Judge WOLIN. All right. I thank the Chair for the courtesy of permitting me to appear here today. I am most appreciative.

Senator HEFLIN. Thank you, sir.

[The questions and answers referred to follow:]

November 13, 1987

Honorable Strom Thurmond
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

Enclosed please find my responses to the written questions given to me today after my hearing.

I appreciate the opportunity to address your concerns and will be happy to answer any further questions you may have.

Sincerely,

Alfred M. Wolin

cc: Senator Joseph R. Biden
Chairman, Committee on the Judiciary

enclosure

RESPONSE OF JUDGE ALFRED M. WOLIN OF NEW JERSEY, TO QUESTIONS SUBMITTED BY SENATOR STROM THURMOND

1. Judge Wolin, I consider judicial temperament to be a prerequisite for a Federal Judge. Would you give me your thoughts on this subject?

In my opinion judicial temperament is a very important aspect of the qualifications of a District Court Judge. The judge should be respectful to all litigants and decide their cases fairly and impartially in a reserved and calm atmosphere.

2. Judge Wolin, another criticism of judicial activism is a tendency by the Judiciary toward problem-solving rather than grievance-resolution. Do you feel that this criticism is valid?

In some cases the criticism is valid. Personally I recognize the doctrine of separation of powers and will limit my judicial responsibility to dispute resolution, understanding that the other constitutionally authorized branches of government are better equipped to serve their respective interests. In short, I would not invade either the legislative or executive function.

Senator HEFLIN. Now, if Mr. Samuel R. Cummings, if you will come forward.

If you will raise your right hand: Do you solemnly swear that the testimony you give in this hearing and on the questions that might be submitted to you in writing, that it will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. CUMMINGS. I do.

Senator HEFLIN. Thank you, sir. Be seated.

TESTIMONY OF SAMUEL R. CUMMINGS, OF TEXAS, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS

Senator HEFLIN. Senator Bentsen has endorsed your nomination and has spoken in favor of you to several members of this committee and have urged them to have a prompt hearing. We are pleased to accommodate this request. I will include Senator Bentsen's statement in the hearing record. The committee has only a few questions for you.

According to your questionnaire response, your litigation experience has been 99 percent civil and only 1 percent criminal. A substantial portion of the district court docket is devoted to criminal matters. Are you prepared to handle a criminal docket?

Mr. CUMMINGS. Mr. Chairman, yes, I am. For the past several months, I have been studying the Federal Code of Criminal Procedure, I have been studying the sentencing guidelines, I have been studying cases on search and seizure, and have been doing some other intensive research in an attempt to bring myself up to speed in that area.

Senator HEFLIN. One of the most difficult tasks of a judge in criminal cases is to sentence convicted defendants and the new sentencing guidelines will change this process, but Federal judges will retain some discretion in setting sentences. In your career, you have had no involvement in the sentencing process. What can you point to in your background to best demonstrate that you will exercise your discretion in sentencing matters wisely and well?

Mr. CUMMINGS. Mr. Chairman, for the past 17 years I have been engaged in private law practice and have learned during that period of time that you need to appreciate people for who they are, you need to empathize with people, you need to consider circumstances with clients as well as people who appear in court, therefore I believe that my experience as far as dealing with people and having empathy for them and understanding their circumstances will be of assistance to me as I exercise discretion in the sentencing process.

Senator HEFLIN. Like many other nominees, you are preparing to make the transition from a role of advocate to that of judge. What is the biggest challenge you face in making this transition, and how do you plan to meet it?

Mr. CUMMINGS. Mr. Chairman, by virtue of being an advocate for the past 17 years, I still ask the ultimate question of whether or not my client has received a fair trial and whether or not a reasonable result has been obtained through any piece of litigation. I think as a jurist the same questions will need to be asked, therefore recognizing that as a licensed attorney I am an officer of the

court and as a jurist I am officer of the court and I think that my perspective essentially will be the same and that the same interest will be in mind as I administer the cases.

Senator HEFLIN. You have actively litigated various personal injury and professional malpractice cases and nearly always you have been on the defense side of the cases. You have also been active in bar organizations in bringing together lawyers who represented insurance companies in these cases. Your experience is commendable, but it raises questions. When you go on the Federal bench, you will bring this background with you. Can you assure this committee that if confirmed you will put your part in professional specialties and associations aside and give fair consideration to all sides in disputes before the court?

Mr. CUMMINGS. Yes, sir, I will assure the committee of that. I understand that my responsibility as a district judge will be to be fair and impartial and to set aside the idea that either a plaintiff or the defense side is entitled to more consideration.

Senator HEFLIN. In other words, although you have devoted much of your career to being a defense lawyer, it is essential that as a judge you must not be perceived as a defendant's judge. How do you plan to prevent this perception from arising?

Mr. CUMMINGS. By following the law, both on substantive matters, on evidentiary matters, and on procedural matters.

Senator HEFLIN. You have served for the past 3 years as Chairman of a Regional Grievance Committee, hearing and resolving complaints against attorneys. From this vantage point, you have probably seen some of the reasons why the legal profession has a bad image among some of the members of the public. What can a Federal judge do to set and enforce the high standards of professional conduct among those lawyers who practice before him?

Mr. CUMMINGS. I think a judge should set high standards for himself, first of all, and once it is known that he has high standards for himself, I think that those who appear in court before him will try to set high standards as well.

Senator HEFLIN. What actions have you taken to fulfill your professional obligation to make legal services available to the disadvantaged?

Mr. CUMMINGS. Through my service on the Grievance Committee for the last 3 years, we have seen to it that individuals who have been the object of attorneys who have overreached them and who have not given them the representation that they should have gotten, we have seen to it that those individuals have obtained attorneys so that their matters can go forward at whatever stage in the process they may find themselves.

Senator HEFLIN. Have you ever provided pro bono representation for an individual organization that could not afford to pay for a lawyer? Please describe your pro bono experience.

Mr. CUMMINGS. In recent years, this. last year I served on the Board of Trustees of the Amarillo Presbyterian Children's Home and I have provided representation and counsel to them on a pro bono basis. Also, through the years, through our Legal Aid Service, my firm, me included, have undertaken to represent individuals who could not afford an attorney.

Senator HEFLIN. Is there anybody else present besides your family that has been previously introduced that you would like to introduce?

Mr. CUMMINGS. Mr. Chairman, just my family and I.

Senator HEFLIN. All right. Fine. You have a very attractive family, and good luck to you.

Mr. CUMMINGS. Thank you very much.

[The prepared statement of Senator Bentsen, and response to questions of Senator Thurmond follow:]

STATEMENT OF SENATOR LLOYD BENTSEN
AT JUDICIARY COMMITTEE HEARING ON THE NOMINATION
OF SAM CUMMINGS TO BE A FEDERAL DISTRICT JUDGE IN THE
NORTHERN DISTRICT OF TEXAS
NOVEMBER 13, 1987

I AM PLEASED TO TAKE PART IN THIS COMMITTEE'S CONSIDERATION OF THE NOMINATION OF SAM CUMMINGS, A FELLOW TEXAN, TO THE FEDERAL BENCH IN THE NORTHERN DISTRICT OF TEXAS. I KNOW THAT SAM IS EXCITED ABOUT HIS NOMINATION TO THE FEDERAL BENCH, AND THAT HE IS ANXIOUS TO BEGIN SERVING IN THAT CAPACITY. WE ALL KNOW THAT THIS COMMITTEE HAS A BUSY AGENDA, AND I GREATLY APPRECIATE THE COOPERATION OF THE COMMITTEE IN ACTING ON HIS NOMINATION EXPEDITIOUSLY.

OVER THE PAST FEW MONTHS, WE HAVE SEEN A GOOD BIT OF CONTROVERSY SURROUNDING THE JUDICIAL NOMINATIONS OF THIS ADMINISTRATION. FORTUNATELY, WE ARE HERE TODAY TO DISCUSS A NOMINATION THAT HAS STRONG BIPARTISAN SUPPORT IN THE STATE OF TEXAS AND A NOMINATION THAT I THINK WE CAN ALL RALLY AROUND. SAM CUMMINGS HAS THE INTEGRITY, QUALIFICATIONS AND JUDICIAL TEMPERAMENT NEEDED ON OUR FEDERAL BENCH AND HE WILL MAKE A FINE ADDITION TO THE NORTHERN DISTRICT OF TEXAS.

ALTHOUGH QUITE YOUNG, AT LEAST FROM MY PERSPECTIVE, SAM WOULD BRING A TRUCKLOAD OF VALUABLE COURTROOM EXPERIENCE TO THE COURT. AFTER GAINING HIS BUSINESS DEGREE FROM TEXAS TECH UNIVERSITY AND HIS LAW DEGREE FROM BAYLOR UNIVERSITY, TWO OF THE FINER SCHOOLS IN TEXAS, SAM JOINED THE DISTINGUISHED FIRM OF CULTON, MORGAN, BRITAIN & WHITE IN AMARILLO, TEXAS. FOR

THE PAST SEVENTEEN YEARS, SAM HAS SERVED THAT LAW FIRM AND ITS CLIENTS WELL WHILE PARTICIPATING DIRECTLY IN A WIDE VARIETY OF LITIGATION MATTERS. THIS EXPERIENCE WILL BE USEFUL TO SAM WHEN FACED THE DIVERSE ISSUES PRESENTED TO OUR FEDERAL JUDGES.

SAM CUMMINGS HAS WHAT IT TAKES TO BE A FAIR AND EFFECTIVE MEMBER OF THE FEDERAL BENCH. I AM PLEASED TO SUPPORT HIS NOMINATION, AND I URGE THIS COMMITTEE TO PROMPTLY APPROVE AND REPORT THE NOMINATION TO THE FULL SENATE.

ANSWERS OF SAM R. CUMMINGS TO QUESTIONS PROPOUNDED
BY SENATOR THURMOND

Q: Are there ever circumstances under which a judge should attempt to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history?

A: No. A judge has the duty and obligation to follow the law. If the law is shown by the intent of the framers of legislation, or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history, that law prevails and should be applied to the facts of the case.

Q: You have been a practicing attorney since 1970. Now you have been nominated to be a United States District Judge for the Northern District of Texas. Do you foresee any difficulty in the transition from advocate to impartial jurist?

A: No. As an advocate, my ultimate concern is that my clients receive a fair and impartial trial. Stated another way, I strive to achieve a reasonable result through the judicial process. As an impartial jurist, I would have the same goals for the administration of justice.

Sam R. Cummings
November 13, 1987

Senator HEFLIN. The hearing is concluded.
[Whereupon, at 12:00 noon, the committee was adjourned.]

ROBERT N. MILLER

Birth:	May 30, 1940	Monmouth, Illinois
Legal Residence:	Colorado	
Marital Status:	Married	Diane Wilmarth Miller 2 children
Education:	1958 - 1962	Cornell College B.A. degree
	1962 - 1965	University of Colorado J.D. degree
Bar:	1965	Colorado
Military Service:	1966 - 1969	United States Air Force Judge Advocate General's Corps
Experience:	1965 - 1966	Marshal Quiat Law Office Associate
	1969 - 1971	Fischer and Beatty Associate
	1971 - 1981	District Attorney 19th Judicial District Greeley, Colorado
	1981 - present	United States Attorney District of Colorado
Office:	1961 Stout Street, Suite 1200 Denver, Colorado 80294 303 844-2081	
Home:	3530 Wagon Trail Place Greeley, Colorado 80634	

To be United States District Judge for the District of Colorado

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

   ROBERT NOLEN MILLER

2. Address: List current place of residence and office address(es).

   3530 Wagon Trail Place
   Greeley, Colorado 80634

   United States Attorney
   1961 Stout Street, Suite 1200
   Denver, Colorado 80294
   303-844-2081

3. Date and place of birth.

   May 30, 1940, Monmouth, Illinois

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   Diane Wilmarth Miller
   Personnel Director
   Aims College
   Greeley, Colorado 80631.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   Cornell College, 1958-1962, B.A.
   University of Colorado, 1962-1965, J.D.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1965-1966 - Associate of the law office of Marshall Quiat, Capitol Life Building, Denver, Colorado.

1966-1969 - United States Air Force - Legal officer in the Judge Advocate General's Office at Myrtle Beach Air Force Base, South Carolina.

1969-1971 - Associated with the law firm of Fischer and Beatty, Fort Collins, Colorado.

1971-1981 - District Attorney, 19th Judicial District, Greeley, Colorado. Prosecuted all criminal cases in the district and represented and advised other elected officials. Taught, on a part-time basis, Business Law and Criminal Law for Aims College.

1981-present - United States Attorney, District of Colorado, 1961 Stout St., Suite 1200, Denver, Colorado. Prosecute all federal crimes in Colorado and represent the federal government in all civil cases in Colorado. I have been a guest lecturer and speaker for several law enforcement groups and other groups on many criminal law topics, i.e.; search and seizure, arrest, prosecution ethics and cross examination.

1980-1984 - EBR Enterprises
1982-1984 - The Bank of Greeley, Greeley, Colorado
1983-1987 - Atomic Investors
1980-1987 - Bob Miller Partnership
1980-1987 - Severance Energy #3
1966-1969 - University of South Carolina and American University
Summer 1963 - Western Construction Company
Summer 1964 - National Blank Book Company
1976-1981 - Centennial Rotary Club
1972-1987 - First Congregational Church

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

1966-1969, United States Air Force, Captain, FV3150762, Honorably Discharged.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Stanley Foundation Scholarship 1958-1962; Law School Scholarship 1962-1965.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Colorado Bar Association; Weld County Bar Association; Federal Bar Association - President 1983-1984; Colorado District Attorney's Council - President 1976-1977; Member of the Ethics Committee of the Colorado Bar Association 1973-1974.
Member of the Attorney General's Economic Crime Council, 1985 to present; Core City U.S. Attorney for the Rocky Mountain Drug Task Force; Past Chairman and member of U.S. Attorney Office Management Sub-committee; Co-Chairman of the Law Enforcement Coordinating Committee for the District of Colorado; Member of U.S. Attorney Working Group on Sentencing Guidelines; Member of U.S. Attorney Working Group on Pornography.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

Congregational Church; Aims College, Curriculum Committee; Boy's Club Board of Directors; Rotary; Elks; Ducks Unlimited; Partners; Phi Alpha Delta; Greeley Country Club; Trout Unlimited; Cornell Student Council; Ft. Collins Country Club; Serotoma; Optimist Club; Boy Scouts; Cornell Letterman's Club; Beta Omicron; Young Republicans; Weld County Republican Central Committee; Methodist Church; National Honor Society; Hi-Y; Thespians; Greeley Club; National Federation of Independent Businessmen.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Colorado Supreme Court, October 1, 1965
U.S. District Court (Colo.), October 1, 1965
Tenth Circuit Court of Appeals, January 5, 1966
United States Supreme Court, January 23, 1969

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Death Roads, Pruett Press, 1979

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent
October, 1986

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

None.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected

or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I was appointed District Attorney for the 19th Judicial District by Governor John Love in January 1971. I was elected three times thereafter and left in December of 1981 when President Ronald Reagan appointed me United States Attorney for the District of Colorado.

I ran, along with four others, for the Republican nomination for Attorney General of Colorado. Two of us were selected to be on the ballot and I lost in the primary election of 1978.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No

2. whether you practiced alone, and if so, the addresses and dates;

No

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

1965-1966 - Associate of the law office of Marshall Quiat, Capitol Life Building, Denver, Colorado. Research and general practice of law.

1966-1969 - Legal officer in the Judge Advocate General's Office at Myrtle Beach Air Force Base, South Carolina. I prosecuted and defended courts martial; rendered legal advice to military personnel and their families; advised the command staff; and participated in administrative proceedings. Taught, on a part-time basis, Business Law for the University of South Carolina and American University.

1969-1971 - Associated with the law firm of Fischer and Beatty, Fort Collins, Colorado. General practice of law.

1971-1981 - District Attorney, 19th Judicial District, Greeley, Colorado. Prosecuted all criminal cases in the district and represented and advised other elected officials. Taught, on a part-time basis, Business Law and Criminal Law for Aims College.

1981-present - United States Attorney, District of Colorado, 1961 Stout St., Suite 1200, Denver, Colorado. Prosecute all federal crimes in Colorado and represent the federal government in all civil cases in Colorado. I have been a guest lecturer and speaker for several law enforcement groups and other groups on many criminal law topics, i.e.; search and seizure, arrest, prosecution ethics and cross examination.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

1965-1966 - General practice of law with individual clients
1966-1969 - Military practice specializing in trial work, both defense and prosecution. Clients were either military personnel or the U.S. Air Force.
1969-1971 - General practice of law with business clients.
1971-1981 - Prosecution of crimes for the State of Colorado. Specialized in trial work and management.
1981-1986 - Prosecution of federal crimes and representation of federal agencies in civil cases specializing in litigation and management of an office.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your

appearances in court varied, describe each such variance, giving dates.

As District Attorney I appeared in court frequently. In private practice and as U.S. Attorney I appeared in court occasionally.

2. What percentage of these appearances was in:
(a) federal courts;
(b) state courts of record;
(c) other courts.

10% in federal courts, 90% in state courts of record

3. What percentage of your litigation was:
(a) civil
(b) criminal

90% criminal, 10% civil.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Over fifty, all as chief counsel.

5. What percentage of the trials was
(a) jury
(b) non-jury

90% jury.
10% non-jury

18. Litigation: Describe the ten of the most significant litigated matters which you personally handled. Give the citations, if the cases were reported and the docket number and date if unreported. Give a capsule summary of the substance of each case, and a succinct statement of what you believe to be the particular significance of the case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the dates of the representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address and telephone numbers of co-counsel and of principal counsel for each of the other parties.

a) People v. Sherman Ramon McCrary, 549 P.2d 1320 (Colo. 1976)

Defendant McCrary was indicted by a state grand jury for kidnapping and first degree murder. I prosecuted the case with Nolan Brown for the State of Colorado and we shared the trial duties equally. Opposing counsel was Frederick Meyer, 555 17th St., Suite 2900, Denver, CO 80202 (303-295-8063). Presiding over the case was Judge Daniel Shannon of the Jefferson County District Court. The trial lasted from April 10 to April 24, 1973.

The case is significant because it was one of the first known serial murder cases in the country. The case involved three generations of one family implicated in a series of kidnappings and murders. The case has been the subject of several television series. I co-authored a book entitled Death Roads about the trial. Among the legal issues involved were severance and change of venue due to pre-trial publicity and conflicting confessions.

McCrary was convicted and sentenced to life on the murder charge and a 29-30 year consecutive sentence for the kidnapping. The conviction was affirmed by the Colorado Supreme Court.

b) People v. Carl Taylor

Taylor was indicted by a state grand jury for kidnapping and first-degree murder. Taylor was Sherman McCrary's son-in-law and was severed from the main murder case. Taylor was granted a change of venue due to publicity surrounding his father-in-law's trial and changed his plea to not guilty by reason of insanity. A sanity trial was conducted involving several expert witnesses. I prosecuted the case with Nolan Brown. We shared trial duties equally. Opposing counsel were Donald

MacDonald, 1600 Broadway, Suite 1900, Denver, CO 80202, (303) 861-7070, and Leonard Waldbaum, 300 E. 17tn Avenue, Suite 940, Denver, CO 80203 (303) 861-1166. Judge Matt Kikel, Pueblo District Court, presided over the one week trial in February, 1974.

Taylor was found legally sane and pled guilty.

c) William Garnsey and Barbara Tatman v. Weld County Commissioners, S. Lee Shehee, Weld County Clerk and Recorder, et al.

The plaintiffs sought to enjoin a special election held to elect new officers for Weld County, Colorado, established under the newly enacted Weld County Home Rule Charter. The plaintiffs also sought a declaratory judgment that the Home Rule Charter was unconstitutional.

I represented the Weld County Clerk and Recorder in the civil action. Other counsel were Leonard Liss, 1888 S. Jackson Street #406, Denver, CO 80210, (303) 759-5599; Charles Karowsky, Suite 550 Greeley National Plaza, Greeley, CO 80631, (303) 352-3161; William West, 1100 10th Street Suite 402, Greeley, CO 80632, (303) 352-4805; and Melvin Dinner, 630 Greeley National Plaza, Greeley, CO 80631, (303) 352-2081. Judge Robert Behrman, Weld County District Court presided. The proceeding lasted several days in June and November, 1975.

Weld County was the first county in the State of Colorado to avail itself of the constitutional amendment allowing counties to establish home rule. Since the injunction and declaratory judgment were denied, a new era of county government began at the conclusion of the lawsuit.

d) United States v. Jake Keller Neal, 743 F.2d 1441 (10th Cir. 1984)

A savings and loan guard convinced the night teller to let him in after hours and killed her and robbed the federally insured savings and loan.

This case is significant because of the issue of the husband and wife privilege since she was the primary witness against the defendant.

The defendant was convicted on May 28, 1982 after a one-week trial. The Tenth Circuit Court of Appeals affirmed the conviction on September 4, 1984. My co-counsel for the United States was John O. Martin and we equally divided all the motions, hearings and trial duties. Opposing counsel were Federal Public Defenders Michael Katz, 1823 Stout Street #282, Denver, CO 80202, (303) 844-4545, and John Richilano, 1600 Broadway, Suite 1430, Denver, CO 80202, (303) 832-1151. The presiding judge was Honorable Jim R. Carrigan, Federal District Judge for the District of Colorado.

e) People v. Jerry Ben Ulmer (Escaped before appeal could be refiled)

Ulmer was charged with felony murder. I prosecuted the case for the State of Colorado with Arthur P. Roy, 1011 14th Avenue, Greeley, CO 36540. Opposing counsel was Stephen Rench, 1900 Olive St., Denver, CO 80220 (303) 871-6312. Judge Hugh Arnold, Weld County District Court, presided over the one-week trial from April 8 to April 14, 1974.

Ulmer was convicted solely on circumstantial evidence. After conviction and sentencing, Ulmer, along with two other inmates at Canon City, escaped and went on a crime spree involving rape and murder in the southwestern United States. One of the inmates was killed during their capture in Texas.

f) People of the State of Colorado v. David Jarrett

The defendant, a student at the University of Northern Colorado, was accused of arson. He had attempted to burn down the dormitory in which he and many other students lived. Some people were injured and others were terrified.

The significance of this trial was the defense of diminished capacity. The defendant was a very

troubled young man from a very good family. He was convicted and sentenced to the state reformatory. I came to know him and his family very well and have since recommended the defendant for a job in business. We all agree that because he was forced to face his problems and pay the price for his mistake, he was able to solve his problems, get his degree and become a stable, married businessman. I felt better about the ultimate result of this case than any other I tried.

Prosecuting with me for the State of Colorado was Rodney Capron, address and phone number unknown. We divided all trial duties equally. The trial was for one week in December 1978, before The Honorable Hugh Arnold, District Court Judge, Weld County District Court. The defense attorney was Michael Morrissey, 1117 Cherokee Street, Denver, CO 80204, (303) 571-5325.

g) United States v. Arvey Drown and Donald Rowberry, (unpublished 10th Circuit opinion)

The defendants were charged with a complicated mail fraud scheme in a multi-count indictment. They had defrauded over ten million dollars from victims across the United States.

This case is significant because the fact situation was so incredibly complex, it was extremely difficult to prove in a way that the jury could follow and understand. The jury did, however, find the defendants guilty after a one week trial in April of 1984. The Tenth Circuit Court of Appeals affirmed the conviction.

Robert McAllister, 700 Speer Boulevard, Denver, CO 80203, (303) 777-3737, was co-counsel with me representing the United States. We shared trial duties equally before The Honorable Alfred A. Arraj, Federal District Judge for the District of Colorado. Opposing counsel were Larry Naves, 730 17th Street, Suite 201, Denver, CO 80202, (303) 572-3334, and Patrick Burke, 730 17th Street, Suite 201, Denver, CO 80202, (303) 572-3334.

h) People v. Roy O. Cornelison, 559 P.2d 1102 (Colo. 1977)

Cornelison was charged with first-degree murder. I prosecuted the case for the State of Colorado. Opposing counsel was John Roehl, whereabouts unknown. Judge Robert Behrman, Weld County District Court, presided. The trial lasted one week in October 1974.

At trial, Cornelison admitted shooting the victim, but claimed self-defense and voluntary intoxication. He was convicted of second-degree murder.

On appeal, the Colorado Supreme Court ruled that the trial court erred in refusing to instruct the jury that evidence of voluntary intoxication at the time of the offense could be considered in determining whether the defendant possessed the requisite criminal intent. The Court also ruled that the trial court committed reversible error in refusing to instruct the jury that voluntary intoxication was an affirmative defense. Cornelison was retried and convicted of second-degree murder.

i) People v. Watkins,

Watkins was accused of beating her baby to death. I prosecuted the case with William G. Pharo, 1961 Stout Street, Suite 1200, Denver, CO 80294, (303) 844-2081, for the State of Colorado. Trial duties were shared equally. Opposing counsel was John Richilano, 1600 Broadway, Suite 1430, Denver, CO 80202, (303) 832-1151. Judge Jonathan Hays, Weld County District Court, presided. The trial lasted one week in 1977.

The case was one of the first where this crime was charged as murder and a conviction obtained instead of using the child abuse statute. The case was also significant because the defense of diminished capacity based upon the defendant's own abuse by her parents as a child was raised. The conviction was affirmed on appeal.

j) People v. Durre, 690 P.2d 165 (Colo. 1984)

Durre was charged with and convicted of first degree murder, first degree kidnapping and aggravated robbery. I prosecuted the case along with William Pharo, 1961 Stout St., Denver, CO 80294, (303) 844-2081, for the State of Colorado. Opposing counsel were A.M. Dominiguez, 822 9th Street, Greeley, CO 80631, (303) 353-4000; Bryan D. Shaha, 936 9th Avenue, Greeley, CO 80631, (303) 355-8224; Craig Truman, 1900 Wazee Street Suite 305, Denver, CO 80202, (303) 297-8800; and Dorian Welch, 2426 E. Bridge Street, Brighton, CO 80601, (303) 659-4274. Judge Jonathan Hays, Weld County District Court, presided. The trial lasted six weeks in August and September 1981.

The trial was the first death penalty case after the enactment of the new Colorado statute. The guilt phase of the case was bifurcated from the sentencing phase. Under the new statute the jury was required to return verdicts on the existence or nonexistence of mitigating and aggravating factors relating to the defendant and the circumstances surrounding the crime. The jury was also required to unanimously agree on the death sentence verdict.

The Colorado Supreme Court vacated the defendant's death sentence on the ground that the verdicts were impermissibly uncertain and failed to satisfy the unanimity requirement of the statute.

The guilt phase of the trial was affirmed by the Colorado Court of Appeals. 713 P.2d 1344 (Colo. 1985).

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As president of the Colorado District Attorneys Association I assisted in drafting and testifying on several new

and significant pieces of legislature, i.e.; sentencing, death penalty, parole eligibility and pornography.

When appointed in 1971 I was the first full-time District Attorney in Weld County. Establishing a full-time professional office and staff with attendant procedures and policies was a significant step in that jurisdiction and in my career.

I was the first United States Attorney to establish a victim-witness program in the United States. Congress subsequently mandated this program throughout the country.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   There are 24 partners in our Atomic Investors Club and we each pay $25 per month to invest in various stocks. My wife's investment club (WIGS) is organized similarly.

   Charles Dickson and I own Bob Miller Partnership which in turn owns a limited partnership interest in Severance Energy #3. We have a small annual income from this ownership.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   I would sever all connections necessary to eliminate the conflict.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   As a candidate for District Attorney and Attorney General. (See question 16)

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation.

Not applicable.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

C.2(a) and (b)

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	6,000	Notes payable to banks—secured	38,000
U.S. Government securities—add schedule	20,000	Notes payable to banks—unsecured	8,000
Listed securities—add schedule		Notes payable to relatives	
Unlisted securities—add schedule		Notes payable to others	5,000
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others	5,000	Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	28,000
Real estate owned— (home)	175,000	Chattel mortgages and other liens payable	4,000
Real estate mortgages receivable		Other debts—itemize:	
Autos	18,000		
Cash value—life insurance			
Other assets—itemize: Severance Energy	6,000		
Country Club	4,000		
Antiques, Furniture, Paintings	75,000		
Government Retirement Account	25,000	Total liabilities	83,000
Atomic Investors	6,000	Net worth	267,000
Prudential-Bache IRAs	10,000	Total liabilities and net worth	350,000
Total assets			
TOTAL ASSETS	350,000		
CONTINGENT LIABILITIES		**GENERAL INFORMATION**	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule.)	NO
On leases or contracts		Are you defendant in any suits or legal actions?	NO
Legal Claims		Have you ever taken bankruptcy?	NO
Provision for Federal Income Tax			
Other special debt			

Robert N. Miller

ROBERT N. MILLER

Schedule for U.S. Government Securities

$20,000 U.S. Savings Bonds jointly held by wife and children for the children's college education. Some of the bonds are gifts to children from the grandparents over the last 12 years.

Schedule for Real Estate Owned and Resl Estate Mortgage Payable

$175,000 Value of personal residence located at 3530 Wagon Trail Pl., Greeley, Colorado, jointly owned by wife and me. Built and purchased in 1971 with a value of $55,000. The real estate mortgage on the residence is carried by World Savings and Loan at 7-1/2% interest. The mortgage is paid off in 2001 and has a present balance of $28,000.

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The role of a federal judge should be that of deciding the case before him or her and to decide it according to the Constitution and the law.

"Judicial activism" has been an issue since Marbury v. Madison and as in all areas of the law there are no absolutes - no black and whites.

Certainly, a federal judge should always adhere to the jurisdictional constraints of Article III and the mandates of Article VI of the United States Constitution. Similarly, a federal judge must honor the Separation of Powers clauses set forth in the Constitution realizing

there are three co-equal branches of government, each checking and balancing the other with separate and distinct functions.

Society should look first to the legislative or executive branches of government to cure its ills. However, if those intitutions fail to act, there may be occasions when individual rights are threatened and the judiciary must act. In that situation a federal judge should act with caution and within the confines of the Constitution and the law.

2. What action in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

I was a director of the University of Colorado Legal Aid Clinic and represented indigent clients while in law school.

I worked in the Larimer County legal aid project while practicing there in 1969 and 1970.

As a prosecutor I have always tried to make all prosecutive decisions based on the facts of the case without regard to race, creed, color or sex.

During my entire adult life I have been very active in civic and church activities which directly and indirectly supported disadvantaged people and groups.

AFFIDAVIT

I, Robert Nolen Miller, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

2/17/87
(DATE)

Robert N. Miller
(NAME)

(SEAL)

Neil C. Trace
(NOTARY)
1200 Federal Building
Denver, Colorado 80294

My Commission expires 11/24/90.

STEPHEN S. TROTT

Birth:	December 12, 1939	Glen Ridge, New Jersey
Legal Residence:	Virginia	
Marital Status:	Married	Sally Snow Trott 2 children
Education:	1962	Wesleyan University Middletown, Connecticut B.A. degree
	1965	Harvard Law School LL.B. degree
Bar:	1966	California
Experience:	1965 - 1982	Office of the District Attorney for Los Angeles County
	1965-71	Trial Deputy District Attorney
	1971-72	Legislative Advocate
	1973-75	Head Deputy, Organized Crime & Narcotics Division
	1975-79	Chief Deputy District Attorney
	1979-82	Head Deputy District Attorney
	1982 - 1983	United States Attorney Central District of California Los Angeles, California
	1983 - 1986	U.S. Department of Justice Assistant Attorney General Criminal Division
	1986 - Present	U.S. Department of Justice Associate Attorney General
Office:	U.S. Department of Justice 10th & Constitution Avenue, N.W. Room 4119 Washington, D.C. 20530 (202) 633-3752	
Home:	6529 Sunny Hill Court McLean, Virginia 22101 (703) 790-0611	

To be United States Circuit Judge for the Ninth Circuit

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Stephen Spangler Trott

2. Address: List current place of residence and office address(es).

Home - 6529 Sunny Hill Court
McLean, VA 22101

Office - U.S. Department of Justice
10th & Constitution, N.W.
Room 4119
Washington, DC 20530

3. Date and place of birth.

December 12, 1939 - Glen Ridge, New Jersey

4. Marital Status (including maiden name of wife or husband's name). List spouse's occupation, employer's name and business address.

Married - Sally Snow Trott

Spouse's occupation - Fund raising and business consultant

Currently unemployed

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Harvard Law School - 1962-65
Received LL.B in June, 1965

Wesleyan University - 1958-62
Received B.A. in June, 1962
(French Literature)

L'Universite Libre de Brussels - Summer of 1959

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

From September 1965 until December 1981 I was employed by the Office of the District Attorney, County of Los Angeles, California as a Deputy District Attorney.

From December 1981 until July 1983 I was employed by the United States Department of Justice in Los Angeles, California as the United States Attorney for the Central District of California.

From July 1983 until September 1986 I was employed by the United States Department of Justice in Washington, D.C. as the Assistant Attorney General for the Criminal Division.

From September 1986 to the present, I have been employed by the United States Department of Justice as the Associate Attorney General.

While in college at Wesleyan University between 1959 and 1962 and shortly thereafter I was a professional musician with a group called "The Highwaymen." The group sang and recorded folk songs and presented live concerts for audiences around the United States. The group disbanded shortly after college although we still get together to present reunion concerts, but not for money. The group had a recording contract with United Artists for which we still draw royalties for record sales.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Distinguished Faculty Award - National College of District Attorneys - Awarded in 1978.

Distinguished Alumnus Award - Wesleyan University, Awarded in 1987.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

California Bar Association - January 6, 1966
(Inactive since June, 1987) Admitted to all courts in the State of California

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

American College of Trial Lawyers, State Bar of California (inactive), Wilderness Fly Fishers, Brentwood Pigeon Club, Los Angeles Racing Pigeon Combine, Academy of Magical Arts (Magic Castle), Society of American Magicians, McLean Racquet Club, Chancery Club and Old Bailey.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the United States - November 6, 1984

Ninth Circuit Court of Appeals - April, 1983

United States District Court - January 5, 1966

California Supreme Court - January 6, 1966

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

(a) "Challenge To Law Enforcement of the Reasonable Good-Faith Exception To The Exculsionary Rule"

(b) The Successful Use of Informants and Criminals as Witnesses for the Prosecution in a Criminal Case

(c) Trial Techniques

(d) Miscellaneous newspaper articles (attached)

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is very good - last exam - June 30, 1987

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decision were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitution issues, together with the citation to appellate court rulings on such opinions.

Not applicable.

16. Public Office: State (chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have never held an elected public office. In addition to my tenure as a Civil Service Deputy District Attorney in Los Angeles between 1966 and 1981, I was appointed to the following positions:

1. Chief Deputy District Attorney, Los Angeles County - October 15, 1975-September 1979, appointed by District Attorney John Van De Kamp

2. I was nominated by President Ronald W. Reagan as the United States Attorney for the Central District of California and confirmed by the United States Senate on February 8, 1982. Prior to that I was the Court appointed United States Attorney in Los Angeles as of December 28, 1981.

3. I was appointed by President Ronald W. Reagan as Assistant Attorney General for the Criminal Division, United States Department of Justice and confirmed by the United States Senate on July 18, 1983, where I served until September 12, 1986.

4. I was appointed on July 16, 1986 by President Ronald W. Reagan as Associate Attorney General of the United States and confirmed by the United States Senate on September 12, 1986. I continue to serve in that position.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the address and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Immediately after law school in 1965, I joined the District Attorney's office in Los Angeles, California, (210 West Temple Street, Los Angeles, California 90012) where I worked as a law clerk awaiting the results of the State Bar Exam. I passed on my first attempt and went to work as a Deputy District Attorney Grade I in January of 1966.

I remained in that office until December of 1981 when I became the United States Attorney for the Central District of California, located in Los Angeles, California. (United States Courthouse, 312 North Spring Street, Los Angeles, California 90012)

While in the District Attorney's office I progressed up the Civil Service Promotional Ladder on the basis of competitive exams, holding Civil Service rankings along the way of Deputy District Attorney Grades I, II, III, IV, and V (Head Deputy). I was promoted in 1975 to Chief Deputy District Attorney by District Attorney John Van De Kamp.

The Chief Deputy's job was the number two post in the office, and it was outside of the Civil Service Ladder.

During my time in the District Attorney's office, I personally tried hundreds of criminal cases of all kinds, and for the three and one-half years that I was Chief Deputy, I was responsible for the affairs of approximately 600 lawyers in the office.

In 1979, I voluntarily stepped down from the Chief Deputy's job and resumed my post as Head Deputy in charge of the Santa Monica Branch office. I did this to return to the prosecutorial side of the office and to be closer to home while my wife was employed and my children were still in school.

As United States Attorney, I ran the affairs of one of the largest United States Attorney's offices in the nation, directly

supervising 100 attorneys engaged in criminal, civil, and tax matters. I also tried cases in the district court and handled two matters before the Ninth Circuit Court of Appeals.

In 1983, I was called to the Justice Department by Attorney General William French Smith to become the Assistant Attorney General in charge of the Criminal Division where I served until September 1986. During this period I generally supervised matters involving federal criminal cases, and I directly supervised the activities of the Appellate Section of the Criminal Division.

I was then elevated in September of 1986 to my current position by Attorney General Edwin Meese III. As the Associate Attorney General of the United States, I am currently the third ranking official in the United States Department of Justice.

I never served as a clerk to a judge or have been in the private practice of law. I have, however, done considerable teaching for the National College of District Attorneys (University of Houston Law Center, Houston, Texas 77004) and the Attorney General's Advocacy Institute of the United States Department of Justice in the area ethics and trial tactics. I have also lectured for California's CEB Program on the law of search and seizure.

Greater detail regarding my job responsibilities is found in my resume which I have attached to this questionnaire.

b. 1. What has been the general character of your practice, dividing it into periods with dates, if its character has changed over the years?

2. Describe your typical clients, and mention the areas, if any, in which you have specialized.

The great weight of my experience has been in the area of criminal law and constitutional criminal procedure, primarily as a trial lawyer. I was directly exposed, however, to civil law during the period between 1981 and 1983 when I served as United States Attorney. Also, in my current position, there is hardly any aspect of federal practice that does not make it onto my agenda in connection with my advisory function to the Attorney General. I also work with the Solicitor General on Appellate matters.

As a prosecutor, my two clients have been the People of the State of California and the Government of the United States.

c. 1. Did you appear in court frequently, occasionally or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

3. What percentage of your litigation was:

(a) civil;
(b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:

(a) jury;
(b) non-Jury.

During the last five years, I have appeared only occasionally in court, personally handling two jury trials on the same case in Federal District Court (April and June of 1982), one oral argument before the Ninth Circuit Court of Appeals (May 2, 1983), and one oral argument before the Supreme Court of the United States, (November 7, 1984). I also appeared periodically in federal district court in Los Angeles on other criminal and civil matters.

One hundred percent of my courtroom time during this period has been spent on federal court matters.

In both jury trials I was the lead trial attorney accompanied by a cross-designated Deputy District Attorney for Los Angeles.

On the Wayte Case, in the Ninth Circuit I was co-counsel. On the Abel case in the Supreme Court, I personally handled the oral argument.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Cases

1. United States v. Harout Sassounian, Cr. 82-143-TJH

This case involved the fire bombing of the home of the Turkish Consul General in Los Angeles, a man who was later murdered by members of the same terrorist group responsible for the fire bombing. Because of the murder, the involvement of organized terrorists, and the identity of the victim, the case had sensitive international ramifications. I personally presented the case to a federal grand jury and did most of the pre-trial legal work.

I was the lead prosecutor in this case which resulted in two jury trials. This first trial was mistried with the government's consent when the jury was subjected to prejudicial television publicity during deliberations. In the second trial, the defendant was convicted as charged.

The first trial took place in April, 1982 in Federal District Court in Los Angeles, Judge Terry J. Hatter presiding. The second trial took place in June, 1982 in the same courtroom before the same judge.

The conviction was unanimously affirmed on appeal by the Ninth Circuit Court of Appeals. The appellate decision was not published.

My co-counsel was Deputy District Attorney Lael Rubin who had been cross-designated by me as a Special Assistant United States Attorney for this case as part of an anti-terrorism task force. Ms. Rubin's address is 210 West Temple Street, Los Angeles, California 90012. Her phone number is (213) 974-3527. Counsel for the defendant was Richard Sherman, 1875 Century Park East, Suite 1500, Los Angeles, California 90067. His phone number is (213) 553-5111.

2. United States v. David Wayte, 710 F.2d 1385 (9th Cir. 1983); CT Apps #82-1699; Sup. Ct. 83-1292 470 U.S. 598 (1985)

David Wayte refused to register for the draft with the Selective Service System. When prosecuted in 1982, he raised a claim in the trial court that he had been denied equal protection under the law, and the case was dismissed by Judge Terry Hatter. I was co-counsel for the United States on the appeal (18 U.S.C. 1983). My co-counsel was John DePue, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C. 20530, whose phone number is (202) 633-3961. Counsel for David Wayte was Mark D. Rosenbaum, ACLU Foundation in Southern California, 633 South Shatto Place, Los Angeles, California 90005. His phone number is (213) 487-1720.

The case in the Ninth Circuit was successfully argued before and decided in favor of the United States by Judges Wright, Coughenour, and Schroeder (Dissenting).

I both worked on the brief with Mr. DePue, planned the appellate strategy, and was lead counsel with respect to the oral argument.

The case was eventually decided in favor of the Government by the United States Supreme Court. The decision is reported at 470 U.S. 598 (1985). The case was important for its discussion of aspects of constitutional law and the viability of the Selective Service enforcement program that was at issue.

3. United States v. Abel, 469 U.S. 45 (1984) Argued Nov. 7, 1984, Dec. 10, 1984.

On writ of certiorari to the United States Court of Appeals for the Ninth Circuit, the significant question of law in this case was whether a witness may properly be impeached by showing that he and the party for whom he testifies belong to a common group. I personally argued this case before the United States Supreme Court during the fall of 1984. The Government prevailed by a unanimous vote of 9-0, reversing the decision of the Ninth Circuit.

In my preparation for this case, I was assisted by Gloria Phares, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C. 20530. Her phone number is (202) 633-3292.

Opposing counsel was Deputy Public Defender Yolanda B. Gomez, Office of the Federal Public Defender, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012. Her phone number is (213) 894-2854.

The trial Judge was Malcolm Lucas, now Chief Justice of the California Supreme Court.

This case settled a significant question raised under the Federal Rules of Evidence regarding the impeachment at trial of witnesses based on common membership with the defendant in an identified group.

4. People v. Bernard Strick, A 078280

In this case, I prosecuted a well-known criminal defense attorney for the felonious killing of his girlfriend's ex-boyfriend. The case was of considerable local interest and discussed extensively in local magazine and newspaper articles. After a hotly contested jury trial in which the police were accused of manufacturing evidence, the defendant was convicted on February 20, 1980 of manslaughter and sentenced to state prison.

The Judge in the case was Charles Woodmansee of the Superior Court of Los Angeles County (now retired). It was tried in Department West "B" in the Santa Monica Branch.

Counsel for Mr. Strick was Donald Wager, 10920 Wilshire Boulevard, Los Angeles, California 90024. His phone number is (213) 553-8252.

5. People v. Raymond Antonio Weathers, A 335348

In this case, I prosecuted Mr. Weathers for the murder of an elderly man during the burglary of his home. The defendant was convicted by a jury of murder in the first degree and sentenced to state prison.

The case, which started as a reasonably uncomplicated matter, took on special significance because one of the victim's neighbors was Supervisor Kenneth Hahn of Los Angeles County. The murder upset his neighbors considerably, and they became quite agitated and vocal when the case was the subject of a lengthy continuance. Supervisor Hahn raised cain. I therefore took over the case to avoid any further delays and to demonstrate concern for the victim's family. At the time I was the Chief Deputy District Attorney of the county, and it was highly unusual for a person in that position to take a case to trial.

The case was tried in Department 120 of the Superior Court of Los Angeles County, Central District, 210 West Temple Street, Los Angeles, California 90012 before the Honorable Julius Leetham. The trial took place in January, 1978. Defense counsel was Deputy Public Defender Michael Shannon, Office of the Public Defender - Pomona Office, 400 Civic Center Plaza, Pomona, California 91766. His phone number is (714) 623-6811.

I had no co-counsel.

6. People v. Erlichman, et al., A 300388

This case involved the 1973 indictment in Los Angeles Superior Court in Department 100 of John Erlichman, Gordon Liddy, Egil Krogh, and David Young for offenses arising out of the break-in of Daniel Ellsberg's psychiatrist's office

in Beverly Hills, California in connection with a plot to deny Ellsberg a fair trial in the Pentagon Papers case.

I conducted the grand jury investigation with Los Angeles County District Attorney Joseph Busch (deceased) and my immediate supervisor Deputy District Attorney Richard Hecht, 210 West Temple Street, Los Angeles, California 90012, whose phone number is (213) 974-3701.

After the indictment, I was the lead lawyer on the case, assisted by co-counsel Robert T. Altman, then a deputy district attorney, now a Los Angeles County Superior Court Judge, Department 129, 210 West Temple Street, Los Angeles, California 90012, whose phone number is (213) 974-5775.

After extensive pre-trial litigation involving attacks on (1) the validity of the grand jury, (2) the indictment, (3) the charges and other legal matters, the case was eventually dismissed on March 13, 1974 in favor of equivalent federal charges brought against the four defendants by the Watergate Special Prosecutor with whom we worked very closely for months. Among other significant aspects of this case was a subpoena issued to then President Richard M. Nixon for his testimony in connection with various issues. The subpoena was never served.

The judges in this case were Los Angeles Superior Court Judges James Kolts (currently in Department 37) and Gordon Ringer (currently in Department 126). Defendant Erlichman was represented by Joe Ball and Douglas Dalton. Joe Ball's address is 211 East Ocean Boulevard, Sixth Floor, Long Beach, California 90802. His phone number is (213) 435-5631. Douglas Dalton's address is 4525 Wilshire Boulevard, Third Floor, Los Angeles, California 90010. His phone number is (213) 933-4945. Defendant Krogh was represented by Norbert Schlei, Hughes, Hubbard & Reed, 555 South Flowers Street, Los Angeles, California 90071, his phone number is (213) 489-5140. Defendant Liddy was represented by Deputy Public Defender Charles Gessler, 210 West Temple Street, Los Angeles, California 90012, his phone number is (213) 974-2927. Defendant Young was represented by Irwin Woodland (now retired) of Gibson, Dunn & Crutcher.

7. People v. Freeman and Howard, A 313603

In the early 1970s, members of organized crime operating out of New York City conceived a plan to swindle the City of Los Angeles out of millions of dollars using stolen City checks and an elaborate network of international bank accounts. I both investigated and prosecuted this high profile, front-page case, working with staff from the United States Senate's Permanent Subcommittee on Investigations and the Organized Crime Section of the Bureau of Investigations of the Los Angeles County District Attorney's Office.

After a lengthy and vigorously contested preliminary hearing, which I handled, Freeman pleaded guilty on August 22 1975 shortly after his arrest and cooperated with the government. Howard later pleaded guilty on July 3, 1975 during jury selection. As a consequence, numerous stolen checks were recovered, and the City's loss was limited to approximately one million dollars, representing one check that got through the system before the plot was discovered.

Mr. Freeman's case was handled in Department 118 of the Los Angeles County Superior Court, Judge Leslie Light presiding. He was represented by Earl Siddall, 1625 W. Olympic Boulevard, Los Angeles, California 90015, whose phone number is (213) 281-2114.

Mr. Howard's case was handled in Department 118 of the Los Angeles Superior Court before Judge Leslie Light. He was represented by Paul Caruso, 425 South Beverly Drive, Beverly Hills, California 90212. His phone number is (213) 553-8580.

8. People v. Keats, A 314278

This case was a separate spinoff from the Freeman and Howard matter. Mr. Keats was identified as a member of a mafia family in New York City who had successfully negotiated the single check that got through the system. Keats utilized banks in Switzerland and Holland to accomplish this scam. With the help of Freeman and Howard, he was tracked down in Puerto Rico and prosecuted in California.

After a preliminary hearing, which I handled, Keats pleaded guilty as charged on June 1, 1976 in Department 125 of the Los Angeles County Superior Court before Judge William B. Keene (now retired). He was represented by Paul Geragos, 717 West Temple, Street, Los Angeles, California 90012, whose phone number is (213) 662-2202, and was eventually sentenced to state prison on multiple counts of grand theft.

9. People v. Joyce Lewis, A 320031

The stolen Los Angeles City checks that fell into the hands of the Mafia in New York City were eventually traced back to a crime ring in Los Angeles under the control of Joyce Lewis. I both investigated and prosecuted the resulting case against her for conspiracy and grand theft of the checks in question. This case was prosecuted in Los Angeles Superior Court in Department 124 before Judge E. Talbot Callister (deceased). She was convicted after a lengthy jury trial on December 4, 1975 and sentenced to prison. Joyce Lewis was represented by Daye Shinn and Curtis Shaw. Daye Shinn's address is 13450 Maxella Avenue, Marina del Rey, California 90292. His phone number is (213) 821-5074. Curtis Shaw's address is 6255 Sunset Boulevard, Los Angeles, California 90028. His phone number is (213) 464-8424.

This case was of considerable significance to the City of Los Angeles. I subsequently worked closely with the controller's office to determine why the city had been vulnerable for this sort of fraud and to insure that procedures and practices were in place to prevent a reoccurrence.

10. People v. Thomas Edward Utter, A 258057
24 CA 3d 535 (1972)

Thomas Utter, aka Thomas Devins was a con man of considerable talent. He tricked Norma Carty Wilson, a 58 year old senior citizen, into signing her hospital and office building over to him with promises of large sums of money to be provided in return by foreign investors. When Utter did not deliver either the money as promised or the investors, she pressed him on the subject and went to see a lawyer to determine what her legal rights might be. In response, Utter lured her to Europe supposedly to meet

mysterious and wealthy investors from Nigeria. His real plan was to murder Mrs. Wilson beyond the reach of American law enforcement, a plan which he carefully researched before the trip.

Utter shot and killed Norma Carty Wilson on November 22, 1968 on a deserted road between Lucarno and Geneva, Switzerland. He then returned to the United States with stories that Norma had been paid handsomely for her property and gone to Sweden for a facelift.

I both investigated and prosecuted the resulting criminal case in 1970 in Los Angeles Superior Court. Utter was represented by Joseph Reichmann, now a United States Magistrate in Los Angeles, 312 North Spring Street, Los Angeles, California 90012, whose phone number is (213) 894-6911. The presiding judge was Judge Malcolm Lucas, currently the Chief Justice of the California Supreme Court. Utter was convicted by a jury of murder in the first degree, robbery in the first degree, and multiple counts of grand theft relating to the frauds by which he stole Mrs. Wilson's real property.

The murder count was reversed by the California Court of Appeals. The opinion is important for its discussion of the extraterritorial application of California substantive law to crimes committed elsewhere.

The remaining robbery and theft convictions were affirmed as was Utter's sentence by Judge Lucas to state prison.

Mrs. Wilson's body was finally discovered years after the trial on the outskirts of Geneva. I attempted without success to convince the Swiss Government to extradite Mr. Devins and prosecute him for her murder. Regrettably, the Swiss Government declined, advising me that they had no interest in a matter that they described as essentially an "American problem."

A book was written about this case. It is called "The Trail of the Fox" by Lawrence Taylor.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.

Other than the numerous cases in which I have been involved, I would note three significant areas of legal activity of some consequence in responding to this question. They are 1) my involvement as a teacher with the National College of District Attorneys and the Attorney General's Advocacy Institute; 2) my work on behalf of the Justice Department against multinational crime and international criminals; and 3) my work in the Los Angeles County's District Attorney's office on behalf of the victims of sexual assault and violent crime.

In 1975 I was selected to be a member of the faculty of the National College of District Attorneys located in Houston, Texas. In that capacity, I both taught courses in Houston and travelled around the country for six years delivering two to three hour lectures at programs sponsored by the College and various state prosecutors' associations.

The purpose of this initiative was essentially to upgrade and professionalize the work of American prosecutors by exposing them to the ideas, experiences, and views of those of us with considerable experience in the field. The opportunity was particularly important to me because of my belief that a prosecutor is not just a paid advocate, but more importantly a representative of government with a special duty to enforce the law fairly and impartially and to breath life into Justice Brandeis' oft-quoted statement in Olmstead v. U.S. that "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."

In that connection, I have taken great care to weave into my lectures on trial tactics a healthy and unmistakable dose of ethical guidance. This, I believe, can be seen in the writings that accompany my lectures, writings that have become in some instances standards for both the NCDA and the Advocacy Institute.

As an example of this approach, I would point specifically to the text of the John Price Lecture delivered by me at the opening of the Career Prosecutor Course in Houston in 1984 just a few days after the Supreme Court's decision relaxing the exclusionary rule matters involving search warrants. My message was simply that the Leon and Sheppard decisions were not a signal to begin to take liberties with the Bill of Rights, to the contrary. The decision as I saw it was a challenge to police and prosecutors to make sure that peoples' constitutional rights of privacy continued to be fully respected.

I have also developed a three-hour training lecture for advanced prosecutors on the difficult subject of using criminals as witnesses for the prosecution. Because of the nature of federal work against drug traffickers, members of the mafia, hate-groups, terrorists, and other confederations of outlaws, federal prosecutors are frequently confronted with the challenge of having to use an accomplice or a co-conspirator to make or to prove their cases. Whenever such a witness is used there exists almost by definition a distinct possibility that the witness may testify to that which he thinks will help his own cause rather than tell the truth. It is my belief that a prosecutor absorbing the material in my presentation will be better able to guard against the contamination of a criminal matter with untruthful information. My lecture recognizes this danger and is designed to accomplish the objective of assisting prosecutors to extract the truth from such witnesses rather than figments of the criminal's biased imaginations. My lecture has been video taped and is available to be reviewed should the Committee wish to see it. The written handout that accompanies the lecture is included in this package.

The second area of significance has been my work against multinational crime and international criminals. Recognizing that crime in the 1980's has become an international problem requiring multinational cooperation and extraterritorial capacities and solutions, I have devoted a significant portion of my time in the Department to the development of the tools and relationships needed to function in this dimension. During my tenure in the Department, we have modernized our international extradition treaties with many countries, developed numerous bilateral mutual legal assistant treaties to secure information and evidence from foreign countries to be used in prosecutions in the United States, and set up bilateral working groups

and conferences with many nations designed to foster international cooperation against crime.

In this vein, we have succeeded in extraditing Carlos Lehderer from Colombia to stand trial in Florida for drug trafficking, we have convinced bank secrecy jurisdiction like the Cayman Islands, the Bahamas, and most recently Panama to open their doors to investigative inquiries, and we have made it possible to prosecute M.A. Hamadei in Germany for the hijacking of TWA Flight 847 and the murder of Navy diver Robert Stethem.

The laws passed by Congress to protect Americans need international teeth to be effective. We have worked hard to make sure that the intent of congress is not frustrated by country-hopping drug traffickers and other gangsters who prey upon our interests from far away places.

Finally, I am extremely proud of my work with the Rape Treatment Center of the Santa Monica, California, Hospital Medical Center. Working with other professionals, we established a sexual assault program in the District Attorney's office in 1975 designed to make sure that women victims of rape and other sexually connected crimes were treated with dignity, respect, and professionalism by everyone in the criminal justice system, from the police officer, to the prosecutor, to the court personnel processing the case. The program we established became a model for many prosecutors' offices throughout the State of California.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Los Angeles County Retirement Fund available in eight years. I paid money into the fund when I was employed by Los Angeles County. I will draw retirement income from it at the age of 55.

I also as a member of The Highwaymen periodically receive royalties from the sales of records recorded between 1959 and 1962 and again in 1975. These royalties come from United Artists and Capitol Records

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will recuse myself from any case relating to any matter in which the Department was actively involved while I was employed by the Justice Department, also from any case in which the District Attorney's office of Los Angeles County was actively involved while I was employed by the County.

I will also recuse myself from any case or matter in which I, my wife, or family have any personal or financial interest. I will consult with the appropriate authorities of the United States Courts for specific instructions and suggestions as to how to implement this objective and for whatever guidance they may have on this subject.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I hope to continue to serve as an instructor with the Attorney General's Advocacy Institute as do may other federal judges. This service provides no compensation.

4. List sources and amount of all income received during the calendar year preceding your nomination and for the current year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

Financial Disclosure Reports for '86 and '87 accompany this questionnaire.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Forms attached

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have never held an position in a political campaign. I did, however, actively work for the election of Joseph P. Busch to be the District Attorney of Los Angeles County in the early 1970s. I gave speeches on his behalf and once performed as a magician at a fund raising event for supporters of his campaign.

Mr. Busch died in 1975, John Van de Kamp, currently the Attorney General of California, was appointed to fill out his unexpired term. I was appointed by Mr. Van de Kamp to be his Chief Deputy. In the two election campaigns that he subsequently ran to retain his appointed office, I gave speeches on his behalf; and in 1980 I appeared on all of his television commercials as a career prosecutor endorsing his campaign for reelection.

The position of District Attorney of Los Angeles County is officially a non-partisan office. Mr. Busch was a Republican. Mr. Van de Kamp is a Democrat.

Attachments

FINANCIAL STATEMENT

NET WORTH

STEPHEN S. AND SALLY S. TROTT

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
(1) Cash on hand and in banks	$ 42,000	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	
Listed securities—add schedule	60,000	Notes payable to relatives	
Unlisted securities—add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	4,000
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	180,000
(2) Real estate owned—add schedule	600,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable	180,000	Other debts—itemize:	
Autos and other personal property	150,000	Dept. Justice Credit Union Loan	2,000
Cash value—life insurance	5,000		
Other assets—itemize:			
Stone Oil Partnership	50,000		
Trashaway	2,500		
Fidelity Muni Bond Fund	160,000		
(3) Common Stock	60,000	Total liabilities	186,000
		Net worth	1,123,500
Total assets	$ 1,309,500	Total liabilities and net worth	$ 1,309,500

CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule.)	
On leases or contracts		Are you defendant in any suits or legal actions? (4)	yes
Legal Claims		Have you ever taken bankruptcy?	no
Provision for Federal Income Tax	1,600		
Other special debt			

1. Cash on hand

   Includes two IRAs: Sec. Pac. Bank, Los Angeles, CA

2. Real Estate

   Home - 6529 Sunny Hill Ct.
   McLean, VA 22101

   Summer Home - McCall Idaho 83638 (no mortgage)

3. Common Stock

   Procter & Gamble
   Westinghouse

4. Various Law Suits

   Various spurious law suits filed against me in capacity as Department of Justice official only. None are considered a financial liability.

July 1987

Financial Disclosure Report

Reporting Status (Check Appropriate Box)		Agency Use Only	OGE Use Only	Date of Appointment, Candidacy, Election or Nomination (Mo., Day, Yr.)	Termination Date (If Applicable) (Month, Day, Year)
☐ Incumbent	☒ New Entrant, Nominee, or Candidate ☐ Termination Filer			8/7/87	
Reporting Individual's Name	Last Name: TROTT,	First Name and Middle Initial: Stephen S.			
Position for Which Filing	Title of Position: Judge-9th Circuit Court of Appeals	Department or Agency (If Applicable)			
Location of Present Office	Address (Number, Street, City, State and ZIP Code): Main Justice, 10th & Constitution, NW Room 4119, Washington, DC 20530		Telephone No. (Include Area Code): (202) 633-3752		
Position(s) Held With the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: Associate Attorney General 9/86 to present Assistant Attorney General 7/83 to 9/86				
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination: Senate Judiciary Committee	Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☒ No			
Certification	Signature of Reporting Individual		Date (Month, Day, Year): 8/12/87		
I CERTIFY that the statements I have made on the form and all attached schedules are true, complete and correct to the best of my knowledge and belief.					
Other Review (If desired by agency)	Signature of Other Reviewer		Date (Month, Day, Year)		
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official		Date (Month, Day, Year)		
The information contained in this report discloses no conflict of interest under applicable laws and regulations.					
Office of Government Ethics Use Only	Signature		Date (Month, Day, Year)		

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if comments are continued on the reverse side) ☐

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I** (Liabilities)—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II** (Agreements and Arrangements)—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

SF 278 (Rev. 1/88)
Filed Chapter 73
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0007

Reporting Individual's Name		Page Number		Schedule
THOTT, STEPHEN S.	**Assets and Income**		2.	A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets							BLOCK C Income																BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)							Type of Income (X)							Category of Amount of Income (X)									If yes, complete Schd. B Part I for those assets including those sold for a loss.	
		None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	YES	NO
S or DC	X Y Z Common Doe Jones & Smith, Hometown, USA			X				X						partnership income			X						$50,000			X
1 S	Oppenheimer & Co. Acct. # 026-73015					X		X										X								
2 S	1. Procter & Gamble Common Stock				X			X										X								
3 S	2. Westingthouse Common Stock				X			X									X									
4 S	The Stone Oil Company LaFayette, IA					X								Partnership Income				X					$1,000			X
5	IRA-Sec. Pac. Nat. Bk			X												X										X
6 S	IRA-Sec. Pac. Nat. Bk				X											X										X
7	Fidelity Municipal Bond Mutual Fund					X				X									X							X
8	Fidelity Municipal Bond Mutual Fund					X				X									X							X
9 S	Edwin S. Snow Uni-Trust 2/28/75 (see attached for holdings.)						X							None	X	(does not provide income for spouse until 1988)										Xa
10 S	Laxalt for President			X										Consultant Fee												X

561

SF 278 (Rev. 1/92)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting Individual's Name	Assets and Income	Page Number		Schedule
TROTT, Stephen S.			3.	A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets								BLOCK C Income															BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)								Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)									Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schd. B Part I for those assets including those sold for a loss.	
		None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	$250,001-$500,000	$500,001-$1,000,000	Over $1,000,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $201)	$201-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$1,000,000	Over $1,000,000			YES	NO
S or DC	Examples: X Y Z Common				X					X									X								X	
	Doe Jones & Smith, Hometown, USA			X												partnership income									$50,000			
1	Department of Justice Salary					X										Salary									82,500			X
2 S	ALMACA				X											Consultant Fee												X
3	Checking acct Sovran Bank		X									X								X								X
4	Retirement Fund, Los Angeles County, California					X						(none				none payable	X											X
5																												
6																												
7																												
8																												
9																												
10																												

SF 278 (Rev. 1/89)
Filing Copy: 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting Individual's Name	Page Number		Schedule
TROTT, Stephen S.		4.	B

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE ☐

ID or DC	Example:	Identification of Assets	Type of Transaction (X)				Amount of Transaction (X)					
			Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000
		X Y Z Common	X			2/1/83			X			
1												
2												
3												
4												
5												
6												

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only:
Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. Exclude transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), exclude gifts from relatives and exclude gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE ☐

ID		Source (Name and Address)	Brief Description	Value
	Example:	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference @/15/83	$500
	Example:	Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
1				
2				
3				
4				
5				
6				

SF 278 (Rev. 1/89)
Part Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0567

Reporting Individual's Name
TROTT, Stephen S.

Page Number	5.	Schedule C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

		Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
S or DC	Example:	First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	20 yrs.			X		
		John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
1											
2											
3											
4											
5											
6											

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☐

	Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example:	Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Home town, USA	7/75 ptnership agmnt.
	Retirement Fund on deposit with the County of Los Angeles, CA. I may withdraw the total amount at any time or receive retirement income at age 55.	Los Angeles County, California	1/6/66 to current

PREVIOUS EDITION USABLE

278-1/88

564

SF 278 (Rev. 1/89)
5 CFR Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0

Reporting Individual's Name	Page Number		Schedule
TROTT, Stephen S.	6.		D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples:	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/82	6/83
	Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/76	11/83

Part II
Compensation In Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☐

	Source (Name and Address)	Brief Description of Duties
Examples:	Doe Jones & Smith, Hometown, USA	Legal services
	Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction
	U.S. Department of Justice - Salary as Associate Attorney General	Work for the Department of Justice

U.S.Trust

UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street New York NY 10005
Tel 212 808-4500

STATEMENT OF INVESTMENTS
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
JUNE 15, 1987

UNITS	DESCRIPTION		UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCEN RETURN ON VALUE
				-TEMPORARY INVESTMENTS-					
AND NOTES									
140,500	U/D/P IN U S TST CO MARKET RATE ACCT		1.000	140,500.00	1.000	140,500.00	100.0	8,711.00	6.3
				-BONDS-					
ABLE									
U.S. GOVERNMENT									
160,000	U S OF AMERICA TREAS NOTE @ 13.25% INT 04/15/1988		103.500	165,600.00	105.063	168,100.80	33.5	21,200.00	6.9
CORPORATE									
150,000	STUDENT LOAN MARKETING ASSOC CANADIAN DLR NT 9.260 09/25/1991	ROD	76.969	115,452.82	77.000	115,500.00	23.0	13,890.00	17.0
200,000	ABBOT LABS NOTE @ 11% INT 02/01/1993	ROD	101.625	203,250.00	109.406	218,812.00	43.5	22,000.00	8.9
	TOTAL TAXABLE			484,302.82		502,412.80	100.0	57,090.00	
	TOTAL BONDS			484,302.82		502,412.80	100.0	57,090.00	

.S.Trust
UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street New York NY 10005
Tel 212 806-4500

STATEMENT OF INVESTMENTS
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
JUNE 15, 1987

UNITS	DESCRIPTION	UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCENT RETURN ON VALUE
	-CONVERTIBLE SECURITIES-							
/ERTIBLE BONDS								
30,000	GENERAL CINEMA CV DEB RGD 2 10% INT 01/15/2009	98.000	29,400.00	199.000	59,700.00	37.2	3,000.00	5.0
50,000	HUMANA INC CONV SEB DEB RGD 8.500 08/15/2009	92.250	46,125.00	101.250	50,625.00	31.6	4,250.00	8.4
FERRED SHARES								
500	ITT CORP CV SER K $4 PFD	94.090	47,045.00	100.000	50,000.00	31.2	2,000.00	4.0
	TOTAL CONVERTIBLE SECURITIES		122,570.00		160,325.00	100.0	9,250.00	
	-COMMON STOCKS-							
SUMER STAPLE								
BEVERAGE								
1,059	SEAGRAM CO LTD COM NPV	41.619	44,075.03	72.500	76,777.50	6.7	1,059.00	1.4

U.S. Trust

UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street New York NY 10005
Tel 212 806-4500

STATEMENT OF INVESTMENTS
U/D EDWIN A SHON
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
JUNE 15, 1987

UNITS	DESCRIPTION	UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCEN RETURN ON VALUE
DRUG & HEALTH CARE								
1,000	ABBOTT LABORATORIES COM	64.866	64,866.10	64.875	64,875.00	5.7	1,000.00	1.5
FOOD PROCESSING								
1,600	MCKESSON CORP COM	29.131	46,609.52	34.625	55,400.00	4.9	2,048.00	3.7
1,000	RALSTON PURINA CO COM	19.936	19,935.59	86.375	86,375.00	7.6	1,240.00	1.4
	TOTAL CONSUMER STAPLE		175,486.24		283,427.50	24.9	5,347.00	
SUMER CYCLICAL								
PUBLISHING								
3,000	CARLTON COMMUNICATIONS PLC ADR COM	16.500	49,500.00	22.875	68,625.00	6.0	198.00	.3
RETAIL								
800	PENNEY J C CO INC COM	50.045	40,036.00	56.125	44,900.00	3.9	1,184.00	2.6
	TOTAL CONSUMER CYCLICAL		89,536.00		113,525.00	10.0	1,382.00	

96-183 O - 89 - 19

U.S.Trust

UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street New York NY 10005
Tel 212 806-4500

STATEMENT OF INVESTMENTS
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
JUNE 15, 1987

UNITS	DESCRIPTION	UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCENT RETURN ON VALUE
INOLOGY								
INFORMATION PROCESSING								
500	INTL BUSINESS MACHINES CORP COM	65.452	32,725.78	159.625	79,812.50	7.0	2,200.00	2.8
OY								
OIL & GAS								
1,000	EXXON CORP COM	46.475	46,475.00	89.375	89,375.00	7.9	3,600.00	4.0
& INTERMEDIATE MATERIALS								
ALUMINUM								
1,000	REYNOLDS METALS CO COM	69.965	69,965.00	75.750	75,750.00	6.7	1,000.00	1.3
NCIAL								
FINANCE,SAVINGS & SERVICES								
1,000	AMERICAN EXPRESS CO COM	39.858	39,857.50	35.875	35,875.00	3.2	760.00	2.1

U.S.Trust
UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street New York NY 10005
Tel 212 806-4500

STATEMENT OF INVESTMENTS
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
JUNE 15, 1987

UNITS	DESCRIPTION	UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCEN RETURN ON VALUE
1,200	HOME FEDERAL SVGS & LOAN ASSN OF SAN DIEGO COM	35.296	42,355.20	31.625	37,950.00	3.3	240.00	.6
INSURANCE								
700	GENERAL RE CORP COM	42.436	29,705.09	56.000	39,200.00	3.4	700.00	1.8
	TOTAL FINANCIAL		111,917.79		113,025.00	9.9	1,700.00	
ITY								
ELECTRIC UTILITY								
2,250	HISCONSIN ENERGY CORP COM	13.372	30,086.79	49.750	111,937.50	9.8	6,480.00	5.8
TELEPHONE & COMMUNICATION								
1,500	CONTEL CORP COM	20.699	31,049.07	32.125	48,187.50	4.2	3,000.00	6.2
3,200	PACIFIC TELESIS GROUP COM	14.662	46,918.55	26.250	84,000.00	7.4	5,248.00	6.2
	TOTAL UTILITY		108,054.41		244,125.00	21.4	14,728.00	
ELLANEOUS								

U.S.Trust

UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street New York NY 10005
Tel 212 806-4500

STATEMENT OF INVESTMENTS
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
JUNE 15, 1987

UNITS	DESCRIPTION	UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCEN RETURN ON VALUE
103	ALLEGIS CORP COM	65.250	6,720.75	90.250	9,295.75	.8	103.00	1.1
MON STOCK FUNDS								
4,159	INTERNATIONAL STOCK FUND FOR TST MARKET VLLUE & ESTIMATED INCOME BASED ON 04-30-87 VALUATION	24.849	103,346.20	31.355	130,405.45	11.4	1,780.05	1.4
	TOTAL COMMON STOCKS		744,227.17		1,138,741.20	100.0	31,840.05	
	TOTAL SECURITIES		1,491,599.99		1,941,979.00	100.0	106,891.05	
	CASH BALANCE		583.45		583.45	0.0		
	GRAND TOTALS		1,492,183.44		1,942,562.45	100.0	106,891.05	

S.Trust
UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street New York NY 10005
Tel 212 806-4500

EQUITY DIVERSIFICATION REPORT
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
JUNE 15, 1987

INDUSTRY CLASSIFICATION	S & P 500 % WEIGHTS	CUSTOMER % WEIGHTS AT MARKET
CONSUMER STAPLE	20.0	24.9
BEVERAGE	2.3	6.7
COSMETICS & HOUSEHOLD PDTS	1.9	
DRUG & HEALTH CARE	8.2	5.7
ENTERTAINMENT & LEISURE	1.3	
FOOD PROCESSING	3.4	12.5
PHOTOGRAPHY	1.0	
TOBACCO	1.9	
CONSUMER CYCLICAL	16.8	9.9
AUTO,PARTS & TIRE	4.1	
FOOD SERVICE & LODGING	1.2	
FURNISHINGS & APPLIANCE	.6	
MEDIA	2.1	
PERSONAL & BUSINESS SERVICES	.1	
PUBLISHING	1.2	6.0
RETAIL	6.0	3.9
SHELTER & BUILDING MATERIALS	.8	
TEXTILE & APPAREL	.7	
TECHNOLOGY	14.7	7.0
AEROSPACE & AVIATION	2.3	
ELECTRONICS & INSTRUMENTS	2.9	
INFORMATION PROCESSING	9.5	7.0
ENERGY	12.5	7.9
COAL & URANIUM	.1	
OIL & GAS	11.3	7.9
OIL SERVICE & DRILLING	1.1	

INDUSTRY CLASSIFICATION	S & P 500 % WEIGHTS	CUSTOMER % WEIGHTS AT MARKET
RAW & INTERMEDIATE MATERIALS	9.0	6.7
ALUMINUM	.5	6.7
CHEMICAL-BASIC	4.3	
CHEMICAL-SPECIALTY		
CONTAINER	.4	
MINING & FABRICATING	1.0	
PAPER & FOREST PRODUCTS	2.2	
STEEL	.6	
CAPITAL GOODS	6.2	
CAPITAL CONSTRUCTION		
ELECTRICAL EQUIPMENT	3.7	
MACHINERY & MACHINE TOOL	1.5	
POLLUTION CONTROL	.7	
TRANSPORTATION EQUIPMENT	.3	
FINANCIAL	6.2	10.0
BANKING	2.2	
FINANCE,SAVINGS & SERVICES	1.6	6.5
INSURANCE	2.4	3.5
TRANSPORTATION	2.8	
AIR TRANSPORT	.9	
RAILROAD	1.5	
TRUCKING & SHIPPING	.4	
UTILITY	12.4	21.3
ELECTRIC UTILITY	4.2	9.8
GAS PIPELINE & DISTRIBUTION	1.3	
TELEPHONE & COMMUNICATION	6.9	11.5
OTHER		12.3
TOTAL	100.6	100.0

U.S. Trust

UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street New York NY 10005
Tel 212 806-4500

BOND MATURITY REPORT
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
JUNE 15, 1987

MATURITY	PAR VALUE	% OF TOTAL AT PAR VALUE	CUMULATIVE % OF TOTAL AT PAR VALUE
1988	$160,000	31.4	31.4
1991	$150,000	29.4	60.8
1993	$200,000	39.2	100.0
AL	$510,000	100.0	100.0

PAR VALUE WEIGHTED CALCULATIONS

AVERAGE LIFE OF BOND HOLDINGS	3.7 YEARS
AVERAGE COUPON OF BOND HOLDINGS	11.2%
AVERAGE CURRENT RETURN	11.4%
AVERAGE YIELD TO MATURITY	10.6%

$140,500.00 OF TEMPORARY INVESTMENTS NOT INCLUDED IN BOND MATURITY REPORT

S.Trust

UNITED STATES [illegible]
OF NEW YORK
45 Wall Street [illegible]
Tel 212 806-4540

U/D EDWIN A SHON
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
MAY 15, 1987

COPIES- 6

S.Trust
UNITED STATES [illegible]
OF NEW YORK
45 Wall Street [illegible]
Tel 212 806 [illegible]

SUMMARY OF INVESTMENTS
U/D EDWIN A SHOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

0519

CLOSE OF BUSINESS
MAY 15, 1987

	NO. OF HOLDINGS	TOTAL COST	TOTAL MARKET VALUE	PERCENT OF VALUE	ESTIMATED ANNUAL INCOME	PERCENT RETURN ON VALUE
TEMPORARY INVESTMENTS	1	284,100.00	284,100.00	15.3	16,761.90	5.9
BONDS	3	484,302.82	501,364.00	27.0	57,090.00	11.4
CONVERTIBLE SECURITIES	3	122,570.00	149,925.00	8.1	9,250.00	6.2
COMMON STOCKS	18	696,205.24	1,033,896.70	55.7	30,950.19	3.0
TOTAL SECURITIES	25	1,587,178.06	1,969,285.70	106.1	114,052.09	5.7
CASH OVERDRAWN		114,367.70-	114,367.70-	6.1-		
GRAND TOTAL		1,472,810.36	1,854,918.00	100.0		

Trust

UNITED STATES [illegible]
OF NEW YORK
45 Wall Street [illegible]
Tel 212 [illegible]

STATEMENT OF INVESTMENTS
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
MAY 15, 1987

UNITS	DESCRIPTION		UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCENT RETURN ON VALUE
				-TEMPORARY INVESTMENTS-					
D NOTES									
84,100	U/O/P IN U S TST CO MARKET RATE ACCT		1.000	284,100.00	1.000	284,100.00	100.0	16,761.90	5.9
				-BONDS-					
E									
.S. GOVERNMENT									
60,000	U S OF AMERICA TREAS NOTE @ 13.25% INT 04/15/1988		103.500	165,600.00	105.375	168,600.00	33.6	21,200.00	7.1
ORPORATE									
150,000	STUDENT LOAN MARKETING ASSOC CANADIAN DLR NT 9.260 09/25/1991	RGD	76.969	115,452.82	76.968	115,452.00	23.0	13,890.00	16.9
200,000	ABBOT LABS NOTE @ 11% INT 02/01/1993	RGD	101.625	203,250.00	108.656	217,312.00	43.4	22,000.00	9.0
	TOTAL TAXABLE			484,302.82		501,364.00	100.0	57,090.00	
	TOTAL BONDS			484,302.82		501,364.00	100.0	57,090.00	

S.Trust
UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street New York N.Y.
Tel 212 806 4500

STATEMENT OF INVESTMENTS
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
MAY 15, 1987

UNITS	DESCRIPTION	UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCENT RETURN ON VALUE
	-CONVERTIBLE SECURITIES-							
ERTIBLE BONDS								
30,000	GENERAL CINEMA CV DEB RGD @10% INT 01/15/2009	98.000	29,400.00	178.500	53,550.00	35.7	3,000.00	5.6
50,000	HUMANA INC CONV SEB DEB RGD 8.500 08/15/2009	92.250	46,125.00	100.250	50,125.00	33.4	4,250.00	8.5
RRED SHARES								
500	ITT CORP CV SER K $4 PFD	94.090	47,045.00	92.500	46,250.00	30.9	2,000.00	4.3
	TOTAL CONVERTIBLE SECURITIES		122,570.00		149,925.00	100.0	9,250.00	
	-COMMON STOCKS-							
UMER STAPLE								
BEVERAGE								
1,059	SEAGRAM CO LTD COM NPV	41.619	44,075.03	70.625	74,791.88	7.2	1,059.00	1.4

S.Trust
UNITED STATES TRUST
OF NEW YORK
45 Wall Street New York N.Y.
Tel 212 806-4500

STATEMENT OF INVESTMENTS
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
MAY 15, 1987

UNITS	DESCRIPTION	UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCEN RETURN ON VALUE
DRUG & HEALTH CARE								
1,000	ABBOTT LABORATORIES COM	64.866	64,866.10	58.875	58,875.00	5.7	1,000.00	1.7
FOOD PROCESSING								
1,600	MCKESSON CORP COM	29.131	46,609.52	32.875	52,600.00	5.1	2,048.00	3.9
1,000	RALSTON PURINA CO COM	19.936	19,935.59	78.500	78,500.00	7.6	1,240.00	1.6
	TOTAL CONSUMER STAPLE		175,486.24		264,766.88	25.6	5,347.00	
MER CYCLICAL								
FOOD SERVICE & LODGING								
2,000	TH SVCS INC COM	14.313	28,625.00	16.375	32,750.00	3.2	200.00	.6
PUBLISHING								
3,000	CARLTON COMMUNICATIONS PLC ADR COM	16.500	49,500.00	22.625	67,875.00	6.6		
RETAIL								

UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street
Tel 212 806 4500

STATEMENT OF INVESTMENTS
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
MAY 15, 1987

UNITS	DESCRIPTION	UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCENT RETURN ON VALUE
800	PENNEY J C CO INC COM	50.045	40,036.00	46.000	36,800.00	3.6	1,184.00	3.2
	TOTAL CONSUMER CYCLICAL		118,161.00		137,425.00	13.3	1,384.00	
NOLOGY								
INFORMATION PROCESSING								
500	INTL BUSINESS MACHINES CORP COM	65.452	32,725.78	160.625	80,312.50	7.8	2,200.00	2.7
GY								
OIL & GAS								
1,000	EXXON CORP COM	46.475	46,475.00	87.125	87,125.00	8.4	3,600.00	4.1
NCIAL								
FINANCE,SAVINGS & SERVICES								
1,000	AMERICAN EXPRESS CO COM	39.858	39,857.50	31.500	31,500.00	3.1	760.00	2.4
1,200	HOME FEDERAL SVGS & LOAN ASSN OF SAN DIEGO COM	35.296	42,355.20	28.625	34,350.00	3.3	240.00	.7

U.S. Trust
UNITED STATES TRUST COMPANY OF NEW YORK
45 Wall Street New York, N.Y.
Tel 212 806-8400

STATEMENT OF INVESTMENTS
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
MAY 15, 1987

UNITS	DESCRIPTION	UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCEN RETURN ON VALUE
INSURANCE								
700	GENERAL RE CORP COM	42.436	29,705.09	50.000	35,000.00	3.4	700.00	2.0
	TOTAL FINANCIAL		111,917.79		100,850.00	9.8	1,700.00	
SPORTATION								
AIR TRANSPORT								
2,000	TRANSWORLD CORP LIQUIDATING TR ESCROW COM	.000	.00	1.000	2,000.00	.2		
ITY								
ELECTRIC UTILITY								
2,250	WISCONSIN ENERGY CORP COM	13.372	30,086.79	48.500	109,125.00	10.6	6,480.00	5.9
TELEPHONE & COMMUNICATION								
1,500	CONTEL CORP COM	20.699	31,049.07	29.750	44,625.00	4.3	3,000.00	6.7
3,200	PACIFIC TELESIS GROUP COM	14.662	46,918.55	23.750	76,000.00	7.4	5,248.00	6.9
	TOTAL UTILITY		108,054.41		229,750.00	22.2	14,728.00	

S.Trust

UNITED STATES TRUST ... OF NEW YORK
45 Wall Street ...
Tel 212 806-4500

STATEMENT OF INVESTMENTS
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
MAY 15, 1987

UNITS	DESCRIPTION	UNIT COST	TOTAL COST	MARKET PRICE	TOTAL MARKET VALUE	% OF SECUR TYPE	ESTIMATED ANNUAL INCOME	PERCEN RETURN ON VALUE
ELLANEOUS								
103	ALLEGIS CORP COM	65.250	6,720.75	72.375	7,454.63	.7	103.00	1.4
)N STOCK FUNDS								
4,159	INTERNATIONAL STOCK FUND FOR TST MARKET VLLUE & ESTIMATED INCOME BASED ON 03-31-87 VALUATION	23.242	96,664.27	29.866	124,212.69	12.0	1,888.19	1.5
	TOTAL COMMON STOCKS		696,205.24		1,033,896.70	100.0	30,950.19	
	TOTAL SECURITIES		1,587,178.06		1,969,285.70	106.2	114,052.09	
	CASH OVERDRAHN		114,367.70-		114,367.70-	6.2-		
	GRAND TOTALS		1,472,810.36		1,854,918.00	100.0	114,052.09	

Trust
UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street New York N.Y.
Tel 212 806 4500

EQUITY DIVERSIFICATION REPORT
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
MAY 15, 1987

INDUSTRY CLASSIFICATION	S & P 500 % HEIGHTS	CUSTOMER % HEIGHTS AT MARKET
CONSUMER STAPLE	19.9	25.6
BEVERAGE	2.3	7.2
COSMETICS & HOUSEHOLD PDTS	1.8	
DRUG & HEALTH CARE	8.2	5.7
ENTERTAINMENT & LEISURE	1.3	
FOOD PROCESSING	3.3	12.7
PHOTOGRAPHY	1.0	
TOBACCO	2.0	
CONSUMER CYCLICAL	16.7	13.4
AUTO,PARTS & TIRE	4.2	
FOOD SERVICE & LODGING	1.2	3.2
FURNISHINGS & APPLIANCE	.6	
MEDIA	2.1	
PERSONAL & BUSINESS SERVICES	.1	
PUBLISHING	1.3	6.6
RETAIL	5.7	3.6
SHELTER & BUILDING MATERIALS	.8	
TEXTILE & APPAREL	.7	
TECHNOLOGY	14.9	7.8
AEROSPACE & AVIATION	2.2	
ELECTRONICS & INSTRUMENTS	2.9	
INFORMATION PROCESSING	9.8	7.8
ENERGY	12.3	8.4
COAL & URANIUM	.1	
OIL & GAS	11.2	8.4
OIL SERVICE & DRILLING	1.0	

INDUSTRY CLASSIFICATION	S & P 500 % HEIGHTS	CUSTOMER % HEIGHTS AT MARKET
RAW & INTERMEDIATE MATERIALS	9.2	
ALUMINUM	.5	
CHEMICAL-BASIC	4.4	
CHEMICAL-SPECIALTY		
CONTAINER	.4	
MINING & FABRICATING	1.0	
PAPER & FOREST PRODUCTS	2.4	
STEEL	.5	
CAPITAL GOODS	6.1	
CAPITAL CONSTRUCTION		
ELECTRICAL EQUIPMENT	3.7	
MACHINERY & MACHINE TOOL	1.5	
POLLUTION CONTROL	.6	
TRANSPORTATION EQUIPMENT	.3	
FINANCIAL	6.4	9.8
BANKING	2.2	
FINANCE,SAVINGS & SERVICES	1.6	6.4
INSURANCE	2.6	3.4
TRANSPORTATION	2.6	.2
AIR TRANSPORT	.8	.2
RAILROAD	1.6	
TRUCKING & SHIPPING	.2	
UTILITY	12.5	22.1
ELECTRIC UTILITY	4.3	10.6
GAS PIPELINE & DISTRIBUTION	1.3	
TELEPHONE & COMMUNICATION	6.9	11.5
OTHER		12.7
TOTAL	100.6	100.0

S.Trust

UNITED STATES TRUST COMPANY
OF NEW YORK
45 Wall Street Fifteenth Floor
Tel 212 806 4500

BOND MATURITY REPORT
U/D EDWIN A SNOW
DATED FEBRUARY 28 1975
CHARITABLE LEAD TRUST

OUR REFERENCE
275500

CLOSE OF BUSINESS
MAY 15, 1987

MATURITY	PAR VALUE	% OF TOTAL AT PAR VALUE	CUMULATIVE % OF TOTAL AT PAR VALUE
1988	$160,000	31.4	31.4
1991	$150,000	29.4	60.8
1993	$200,000	39.2	100.0
L	$510,000	100.0	100.0

PAR VALUE WEIGHTED CALCULATIONS

AVERAGE LIFE OF BOND HOLDINGS	3.8 YEARS
AVERAGE COUPON OF BOND HOLDINGS	11.2%
AVERAGE CURRENT RETURN	11.5%
AVERAGE YIELD TO MATURITY	10.7%

$284,100.00 OF TEMPORARY INVESTMENTS NOT INCLUDED IN BOND MATURITY REPORT

Financial Disclosure Report

Reporting Status (Check Appropriate Box)			Agency Use Only	OGE Use Only	Date of Appointment, Candidacy, Election or Nomination (Mo., Day, Yr.)	Termination Date (If Applicable) (Month, Day, Year)
[X] Incumbent	[ ] New Entrant, Nominee, or Candidate	[ ] Termination Filer				

	Last Name	First Name and Middle Initial
Reporting Individual's Name	TROTT	STEPHEN S.
Position for Which Filing	Title of Position: Associate Attorney General	Department or Agency (If Applicable): U.S. Department of Justice
Location of Present Office	Address (Number, Street, City, State and ZIP Code): 10th & Constitution, NW, Washington DC 20530	Telephone No. (Include Area Code): (202) 633-3752
Position(s) Held With the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: Assistant Attorney General - Criminal Division 7/29/83-9/15/86	

	Name of Congressional Committee Considering Nomination	Do You Intend to Create a Qualified Diversified Trust?
Presidential Nominees Subject to Senate Confirmation		[ ] Yes [ ] No

Certification	Signature of Reporting Individual	Date (Month, Day, Year)
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.	[signature]	6/19/87
Other Review (If desired by agency)	Signature of Other Reviewer	Date (Month, Day, Year)
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official	Date (Month, Day, Year)
The information contained in this report discloses no conflict of interest under applicable laws and regulations	[signature]	6/19/87
Office of Government Ethics Use Only	Signature	Date (Month, Day, Year)

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if comments are continued on the reverse side) [ ]

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I (Liabilities)**—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II (Agreements and Arrangements)**—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

PREVIOUS EDITION USABLE

SF 278 Rev. 1/95
5 CFR Chapter XCVI
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name	Assets and Income	Page Number	2.	Schedule A
Trott, Stephen S.				

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets							BLOCK C Income														BLOCK D Transactions	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)							Type of Income (X)							Category of Amount of Income (X)								Actual Amount (Only if "Other" or "Specified Asset")	Date (Mo., Day, Yr.) (Only if Honoraria)	If yes, complete Sched. B Part I for those assets and including those sold for a loss	
		None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	$250,001-$500,000	Over $500,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $201)	$201-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$1,000,000	Over $1,000,000			YES	NO
S DC	Exam-ple: X Y Z Common				X				X									X									
	Doe Jones & Smith, Hometown, USA			X											ownership income									$50,000 est.			
1 S	Oppenheimer & Co. Acct # 026-73015					X			X										X								
2 S	1. Procter & Gamble Common Stock				X				X			X							X							X	
3 S	2. Westinghouse Common Stock				X				X			X						X								X	
4 S	The Stone Oil Company LaFayette, LA					X									Partnership Income				X					$ 2,000			X
5	IRA-Security Pacific National Bank			X												X											X
6 S	IRA-Secruity Pacific National Bank				X											X											X
7	Fidelity Municipal Bond Mutual Fund					X					X									X							X
8	Fidelity Municipal Bond Mutual Fund					X					X									X							X
9	Income from L.A. County District Atty Lawsuit-settlement for past wages		X																X					$ 4,300			
10 S	Edwin S. Snow Uni-Trust 2/28/75 (see attachment for holdings)							X							None	X	(does not provide income for spouse until 1988)										X *

278-2nd

Reporting Individual's Name: Trott, Stephen S.

Assets and Income

Page Number: 3. Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $200 in income during the reporting period. This includes: (1) stocks, bonds, tax shelters, bank accounts, real property, (2) mutual funds, pensions, IRA's, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A: Assets & Income Sources	BLOCK B: Valuation of Assets	BLOCK C: Income																		BLOCK D: Transactions Test	
Identify each asset and income source of you, your spouse(S) and your dependent child (DC) NONE	Category of Value (X)								Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)								Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Sched. D Part I for those assets (a) producing those solid for a loss.	
	None (or less than $1001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000	Interest	Dividends	Rent	Capital Gains	Exempt from Disclosure	Qualified Trust		None (or less than $101)	$101 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	Over $100,000			YES	NO
S DC Examiner: X Y Z Common Los Jones & Smith, Hometown, USA			X			X			X						earned income			X						$50,000			
1 Dept. of Justice -Salary					X										Salary							X		72,500			X
2 S ALMACA					X										Consultant Fee							X		50,520			X
3 S Chavez for U.S. Senate			X												Consultant Fee					X				7,000			X
4 Checking acct Sovran Bank		X									X							X									X
5 Retirement Fund-LA County, California					X					(none)					none payable	X											X
6 "The Highwayman"		X													Record Royalty				X					1,500			X
7 Personal Residence 13500 Bayliss Road, Los Angeles, CA						X						X											X			X	
8																											
9																											
10																											

SF 278 Rev. 1/95
7 CFR Chapter 7Ch
U.S. Office of Personnel Management

Form Approved:
OMB No. 3209-0007

Reporting Individual's Name

Trott, Stephen S.

Page Number	4.	Schedule B

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE ☐

S or DC	Exempt	Identification of Assets	Type of Transaction (X) Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	Amount of Transaction (X) $1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	Over $250,000
		X Y Z Common	X			2/1/83					
1 S		75 shares Procter & Gamble Common Stock		X		5/16/86		X			
2 S		100 shares Westinghouse Electric Common Stock		X		5/16/86	X				
3		Personal Residence sale -12500 Bayliss Road, Los Angeles, CA 90049		X		1/86					X
4		Fidelity Muni Bond Fund	X			2/86			X		
5		Fidelity Muni Bond Fund	X			2/86			X		
6											

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only:
Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. Exclude transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), exclude gifts from relatives and exclude gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE ☒

S	Exempt	Source (Name and Address)	Brief Description	Value
		Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/83	$500
		Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
1				
2				
3				
4				
5				
6				

SF 278 (Rev. 1/86)
Part Chapter 73
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting Individual Name	Page Number	Schedule
Trott, Stephen S.	5	C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

		Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
S or DC	Examples:	First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	28 yrs.			X		
		John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
1		Glendale Federal Sav. & Loan - Glendale, CA (this mortgage was paid off during 1/86 as part of house sale)	First Mortgage on home being rented	1966	6¼	30	(1966-1996)			x	
2		Glendale Federal Sav. & Loan - Glendale, CA (this mortgage was paid off during 1/86 as part of house sale)	Second Mortgage on house being rented	1985	12.75	30	(1985-2015)		x		
3											
4											
5											
6											

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment; leaves of absence; continuation of pay or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☐

	Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example:	Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Home town, USA	7/78 partnership agmnt.
	Retirement Fund on deposit with County of Los Angeles, CA. I may withdraw the total	Los Angeles, County	1/6/66 to
	amount at any time or recieve retirement income at age 55.		current

PREVIOUS EDITION USABLE

278-1002

SF 278 (Rev. 1/95)
Part Chapter 734
U.S. Office of Personnel Management

Reporting Individual's Name

Schedule D

6.

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal or political entities or those solely of an honorary nature.

NONE: ☑

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo./Yr.)	To (Mo./Yr.)
Examples:	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/82	6/83
	Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/75	1/83

Part II
Compensation In Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such: This includes the names of clients and customers of any cor[illegible] services generating a fee or payment of more than $5,000. compensation received by you or your business affiliation for a corporation, firm, partnership or other business enterprise, or [illegible] You need not report the U.S. Government [illegible] services directly provided by you during the reporting period to any nonprofit organization when you directly provided the [illegible] as a source.

NONE: ☒

	Source (Name and Address)	Brief Description of Duties
Examples:	Doe Jones & Smith, Hometown, USA	Legal services in [illegible]
	Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction [illegible]

SF 278-100

589

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantages." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My entire career as a lawyer has been devoted to public service. After law school I went directly to work for the County of Los Angeles and I remained there until 1981 when I shifted to the federal government. During this time, I have been specifically prohibited by law from engaging in the outside private practice of law. I have therefore not participated in those activities generally contemplated by Canon 2. However, I have always regarded part of my mandate as a public servant to serve all sectors of the public equally and to respect impartially and with an even hand the rights of all including the rights of the disadvantaged.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies? If so, list with dates membership. What have you done to try to change these policies?

At Wesleyan University in 1959 I joined the local chapter of a fraternity that was engaged in a heated battle with its national parent organization to change the bylaws of the group to eliminate exclusionary policies. The local chapter which I joined had refused to pay its dues to the national and chose instead to fight to change the bylaws rather than permit the national to continue in its ill-conceived ways. I joined to be a part of this battle. When I became a member, the ranks of the officers of the local included both jews and blacks. To make a long sad story short, we lost the fight. The national refused to budge. We therefore severed our relationship with Alpha Chi Rho and became a local fraternity, calling ourselves EQV from the latin phrase Esse Quam Videre ("To be rather than to seem"). We chose a latin motto specifically to reject the Greek discriminatory tradition. We had the full support of Wesleyan University in this important effort which resulted in other fraternities on campus following suit.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated.

Not applicable for the Circuit Court to which I have been nominated. I simply made my interest in the vacancy known to the Attorney General and his staff, and the matter went forward from there. Since I and my work are well known to the Attorney General, the Office of Legal Policy, and to the White House, I did not go through the regular interview process although I did fill out all the forms and standard questionnaires required of all candidates. They do not involve positions on issues.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

The unqualified answer to this question is "no."

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the same manner of an administrator with continuing oversight responsibilities.

The essential task of a judge in the discharge of his or her official duties is to interpret and apply the law of the land--be it found in the form or a statute or a constitutional mandate--in a manner that accords full respect to 1) the language and plain meaning of the text in question, and 2) the discernible intent, purpose, and spirit with which it was enacted; and 3) legal precedent. Conversely, it is not the role of a judge either to make law where none exists, or to alter or ignore it where it runs counter to the judges own personal beliefs. I would agree with the thought that "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections."

My affinity for "judicial restraint," as contrasted with "judicial activism", however, does not mean that I believe that a judge's head must of necessity be buried in the sands of yesteryear. The Constitution is a resilient and flexible document expressing enduring principles that can easily accommodate features of twentieth century life that were unheard of when the Constitution was drafted. The court-sanctioned electronic surveillance of certain activities of criminals is a good example of this adaptiveness. It is my view that judicial restraint does not dictate a crabbed view of the law which looks only to the past for solutions to present problems of constitutional dimension. I would also note in this vein that certain decisions of the Supreme Court that stood for years as "the law of the land" in retrospect have not added to the luster of our distinguished history. It must never be forgotten that

the Supreme Court at various times has effectively sided with slavery, denied that the franchise to women, approved the segregation by race of children attending public schools, and sanctioned the forcible relocation and internment of innocent citizens of Japanese ancestry during World War II. In this regard, a judge must always be vigilant to insure that the law in all of its respects remains healthy, viable, and true to the basic constitutional values upon which our nation was founded.

I believe also that a judge ought to take care to respect the prerogatives of the executive and legislative branches of government, taking care not to invade inappropriately that part of the domain of democratic government in which certain decisions are left to the people to be made by their elected representatives. It is very important in this respect for a judge to understand and to respect the doctrine of separation of powers and the system of checks and balances set forth in the Constitution itself.

Within this format, I believe that judges acting with care and wisdom can both solve problems as well as resolve grievances, and that there are occasions where it is appropriate for the issuance of far reaching orders extending to broad classes of properly joined individuals in a single-plaintiff matter. I am also sanguine about the idea that broad affirmative duties ordered by a court sometimes are necessary to enforce the law, such as in a situation involving unlawful segregation or discrimination with in a school district or a government entity.

Notwithstanding the foregoing, I also believe that jurisdictional requirements involving standing and ripeness are appropriate jurisdictional considerations in court. These requirements help prevent the courts from usurping the lawful function of the other branches of government, especially the legislative branch, and they discourage excessive and unwarranted government by litigation which among other things has overcrowded the dockets of our courts.

Finally, a court ought to be reluctant to impose itself upon other autonomous institutions in the manner of an administrator. This is a role for which judges are basically not well trained, and it is a function that begins to take the judiciary out of its proper role while injecting it into the spheres of others. Only in the event of a clear need for such close supervision, and then only that limited period of time required to accomplish a specific objective, should such an approach ever be contemplated.

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewett
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
James J. Beerbower
International Square
Suite 1275
1875 Eye Street, N.W.
Washington, DC 20006

BOARD OF GOVERNORS
LIAISON
Sharp Whitmore
2005 Gird Road
Fallbrook, CA 92028

STAFF DIRECTOR
Wantland L. Sandel, Jr.
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5685

STAFF ASSISTANT
Diane Livingston
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5701

AMERICAN BAR ASSOCIATION **Standing Committee on Federal Judiciary**
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

RECEIVED AUG 1 3 1987

August 10, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: STEPHEN S. TROTT
United States Court of Appeal
for the Ninth Circuit

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Stephen S. Trott for appointment as Judge of the United States Court of Appeals for the Ninth Circuit.

Our Committee is unanimously of the opinion that Mr. Trott is "Well Qualified" for this appointment.

Sincerely,

Robert B. Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

ALFRED M. WOLIN

2. Address: List current place of residence and office address(es).

HOME 9 Cambridge Drive
Warren, New Jersey 07060

OFFICE Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07207

3. Date and place of birth.

September 17, 1932 - Orange, New Jersey

4. Marital Status: (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Married. March 27, 1960. Jane Zapeikov Wolin.

SPOUSE'S EMPLOYMENT:

District Manager
A.T. & T. (Data Systems Division)
Mount Airy Road
Basking Ridge, New Jersey.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Michigan, 1950-1954, Bachelor of Arts Degree
Rutgers University Law School, 1956-1959, Bachelor of Laws--Juris Doctor 1968.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

From April 8, 1960 until October 1970 I practiced in association with my father at 1143 East Jersey Street, Elizabeth, New Jersey. Thereafter, my associations were as follows:

October 1970 - 1971: Muscatello, Wolin and Garrubbo, a law firm with offices located at 567 Morris Avenue, Elizabeth, New Jersey (Partner)

1972 - 1978: Wolin and Garrubbo, a law firm with offices located at 567 Morris Avenue, Elizabeth, New Jersey (Partner)

1978 - 1980: Read, Wolin, Garrubbo and Span, a law firm with offices located at 567 Morris Avenue, Elizabeth, New Jersey and at 435 East Broad Street, Westfield, New Jersey 07090 (Partner)

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

Yes. November 4, 1954 to September 6, 1956. United States Army. SP3. US513335780. Honorably discharged.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

I have received three plaques in recognition of my service to the Legal Aid Society as Chief Attorney, as Secretary of the Union County Ethics Committee and as President of the Union County Bar Association.

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

1. Union County Bar Association - Secretary 1970-1974
   President Elect - 1975
   President - 1976
   Judicial Appointments Committee

2. New Jersey State Bar Association

   Committees:
   Judicial Selection
   Discipline of the Bar
   Lawyer Referral

3. American Bar Association - not a current member.

4. American Judicature Society - not a current member.

Union County Ethics Committee - Secretary 1970-1978

As President of the Union County Bar Association and as a member of the judiciary, I have been a delegate to the New Jersey Judicial Conference sponsored by the New Jersey Supreme Court with the assistance of the Administrative Office of the Courts. I was an invited guest speaker at the 1986

Judicial Conference and spoke on the Union County Amended Speedy Trial Plan. At a prior judicial conference in my capacity as Secretary of the Union County Ethics Committee I was an invited guest speaker and addressed the conference on matters pertaining to legal ethics.

I currently serve on several Supreme Court committees by designation of Chief Justice Robert N. Wilentz and the Supreme Court. They are as follows:

1. The Statewide Speedy Trial Committee as well as The Executive Committee of the Statewide Speedy Trial Committee

2. The Conference of Presiding Criminal Judges

3. The Criminal Practice Committee

I am currently the chairman of two subcommittees engaged in the study of revised counting and reporting procedures to evaluate criminal calendar performance as well as a committee evaluating existing pretrial intervention rules.

Each year the New Jersey Supreme Court hosts a judicial college. In 1986 I taught a seminar on jury selection with a a focus on State v. Gilmore and Batson v. Kentucky each dealing with the exercise of peremptory challenges directed towards the exclusion of a cognizable group.

In 1987 I am scheduled to conduct a seminar dealing with how to try a capital case from the judicial perspective.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

LOBBYING: NONE

CIVIC:

Temple Emanuel
Westfield, New Jersey
(former board member)

Jewish Federation of Central New Jersey
(former board member)

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

State of New Jersey - April 8, 1960

United States District Court for the District of New Jersey - April 8, 1960

Supreme Court of the United States of America - October 28, 1963

Admitted to practice before Internal Revenue Courts - Date unknown

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Speech on case management presented at the 1986 Judicial Conference regarding the postindictment phase of the Amended Speedy Trial Program.

Interoffice memo dated April 9, 1987 and addressed to the Conference of Presiding Judges of the Criminal Part pertaining to privileged status of Uniform Defendant Intake Report. This memorandum dealt with confidentiality and a privileged status toward information provided by defendants as part of the intake process. It opposed a recommendation of the criminal practice committee.

(SEE APPENDIX A)

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. October, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I am currently a judge of the Superior Court of New Jersey. My initial appointment was to the Union County District Court on June 23, 1980. By legislative abolition of all District Courts I became a Superior Court Judge. On June 17, 1985, I was reappointed as a Superior Court Judge with tenure. Since my initial appointment I have been assigned to the following courts:

1. Juvenile and Domestic Relations Court from June 24, 1980 to January 25, 1982.

2. Superior Court-Civil Part from January 25, 1982 to April 5, 1982.

3. Superior Court-Criminal Part from April 5, 1982 to November 29, 1982.

4. Superior Court-Civil Part from November 29, 1982 to November 14, 1983.

5. Superior Court-Criminal Part from November 14, 1983 to the present. I am currently the Presiding Judge of the Criminal Part having been appointed to that position by Chief Justice Robert N. Wilentz on December 19, 1984 effective January 1, 1985.

I have been appointed to all of my judicial offices by the Governor with consent of the New Jersey Senate.

An overview of my judicial service corresponding to my assignments is as follows:

A. Juvenile and Domestic Relations Court.

1. The title of the court is explanatory of the jurisdiction of the court. My primary assignment was to the juvenile part of the court. During my assignment to that court I conducted various types of hearings. The nature and number were as follows:

Preliminary and Detention - 1341
Counsel not mandatory - 1975
Counsel mandatory - 4046

These statistics are based on weekly reports submitted to my Assignment Judge and the Administrative Office of the Courts.

B. Superior Court-Civil Part - January 25, 1982 to April 5, 1982. This is a court of unlimited civil jurisdiction. In my brief assignment to this court I participated in 19 jury cases and 2 non-jury cases.

C. Superior Court - Criminal Part - April 5, 1982 to November 27, 1982. In this period of service I presided over 30 criminal trials and accepted 147 pleas.

D. Superior Court - Civil Part - November 29, 1982 to November 14, 1983 I presided over civil trials of which only 4 were non-jury. During this period of time I conceived and initiated a settlement program named CASE an acronym for Come And Settle Early. It resulted in the settlement of more than 400 cases.

1. A prototype CASE assignment letter and order is designated as Appendix B and is attached hereto and made a part hereof.

2. Letter dated August 2, 1983 addressed to Leo Kaplowitz, Esq., (also contained in Appendix B).

14. (continued)

E. Superior Court-Criminal Part - from November 14, 1983. During 1984 I presided over 27 trials and accepted 466 pleas. In 1985 with my appointment as presiding judge of the court and increased administrative duties, my availability for trial commitments changed. In 1985 I presided over 7 cases and accepted 466 pleas. Two of these trials were capital homicide cases. In 1986 I presided over 1 trial and accepted 955 pleas. The nature and character of the court had changed with the amendment of the Union County Speedy Trial Plan and all facets of case management were centralized under my control.

F. Lawyers who tried significant civil matters before me are:

1. Donald Berlin
   161 Madison Avenue
   Morristown, New Jersey 07960
   (201) 539-6030

2. Walter L. Leib
   328 Park Avenue
   Scotch Plains 07076
   (201) 322-6200

3. Paul G. Nittoly
   131 Madison Avenue
   Morristown, New Jersey 07960
   (201) 285-1000

4. Alan Medvin
   Gateway 1
   Newark, New Jersey 07102
   (201) 642-1300

5. Edwin J. McCreedy
   6 Commerce Drive
   Cranford, New Jersey 07016
   (201) 709-0400

14. (continued)

F. (continued)

6. Kenneth S. Javerbaum
966 South Springfield Avenue
Springfield, New Jersey 07081
(201) 379-4200

7. Honorable William L'E. Wertheimer
Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07207
(201) 527-4373

8. Albert L. Cohn
Park 80 Plaza West One
Saddle Brook, New Jersey 07662
(201) 845-9600

G. Lawyers who tried significant criminal matters before me are:

1. Joseph A. Hayden, Jr.
80 River Road
Hoboken, New Jersey 07030
(201) 795-9681

2. Anthony Rinaldo, Jr.
450 Westfield Avenue
Elizabeth, New Jersey 07208
(201) 353-5300

3. Joseph W. Spagnoli
115 Jefferson Avenue
Elizabeth, New Jersey 07201
(201) 527-1804

4. Richard S. Lehrich
240 East Grove Street
Westfield, New Jersey 07090
(201) 654-1666

5. Daniel A. Williamson
900 Madison Avenue
Plainfield, New Jersey 07060
(201) 754-6666

14. (continued)

G. (continued)

6. David P. Corrigan
270 Highway 35
Middletown, New Jersey 07748
(201) 741-3900

7. Francis S. Rossi
103 Eisenhauer Parkway
Roseland, New Jersey 07068
(201) 403-9000

8. James L. Sonageri
131 Madison Avenue
Morristown, New Jersey 07960
(201) 285-1000

9. Kevin G. Byrnes
Box 3719
Princeton, New Jersey 08543
(609) 921-0996

10. Arthur L. Lash
101 Poor Farm Road
Princeton, New Jersey 08543
(609) 921-6543

11. Norman S. Karpf
Ferry Plaza Building
Edgewater, New Jersey 07020
(201) 945-1616

H. Prosecutors who have tried multiple criminal trials before me are:

1. Howard Weiner
2. Eleanor Clark
3. David J. Hancock (two capital cases - (State v. Sainvailler and State v.Booker).

The above may be reached at Administration Building, Elizabeth, New Jersey 07207 (201) 527-4500.

14. (continued)

I. Public Defenders who have tried multiple criminal trials before me are:

1. S. David Levy (capital)
2. James S. Kervick (capital)
3. James Daniels
4. Frank Meehan
5. Joan Van Pelt
6. Frank Krack
7. Linda Mehling

The above may be reached at the Office of the Public Defender, 125 Broad Street, Elizabeth, New Jersey 07101. (201) 820-3070.

J. Case Management Accomplishments.

1. LCP Chemicals and Plastics, Inc. v. Kuehne Chemical Company, Inc., Defendant-Third Party Plaintiff, v. Christian A. Hansen, Jr., William C. Calvert, Jr. Donald R. Maynard, William R. Crate and Arnold F. Simon, third party defendant consolidated with Robert F. Goetzel v. Christian A. Hansen, Jr. Docket #L-11734-80

This convoluted and complex case contained multiple causes of action alleging fraud, theft, violation of trade secrets, coercion, breach of contract etc. It had suffered from one year of judicial neglect and was transferred to me for case management and disposition. At first examination it appeared to be a trial with the potential to last nine months. Pending motions were decided, regular case management conferences held and a settlement ultimately arrived at during a marathon fourteen hour settlement conference that commenced at 9:00 A.M. and terminated at 11:00 P.M. In the civil sector this is the case that provided me the most judicial satisfaction.

14. (continued)

J. (continued)

1. (continued)

Counsel involved were:

1. LCP Chemicals - Shanley and Fisher by
   Arthur R. Schmauder, Esq.
   131 Madison Avenue
   Morristown, New Jersey 07960
   (201) 285-1000

2. Kuehne Chemical Company, Inc.
   Lindabury, Estabrook and McCormick by
   Kenneth L. Estabrook and Richard Width, Esqs.
   184 Elm Street
   Westfield, New Jersey 07091
   (201) 233-6800

3. Robert F. Goetzel - Hannoch Weissman by
   James J. Shrager
   4 Becker Farm Road
   Roseland, New Jersey 07068

2. State of New Jersey v. Sidney Schlanger et al. This was a State Grand Jury indictment involving eighteen defendants, fifteen insurance companies and over one million dollars in fraudulent claims. I was assigned this case in November of 1983 and by regular case management conferences was able to dispose of this case by April 1985. Three defendants went to trial and 15 entered pleas of guilty. The case that I tried was State v. Robert Schlanger involving a lawyer accused of conspiracy and theft by deception. After a 5 week trial the matter was mistried due to the jury's inability to arrive at a verdict My opinion in State v.Schlanger reported at 197 N. J. Super 548 (1984) arose out of this case. Counsel were:

Former Deputy Attorney General
Walter J. Krako for the State

14. (continued)

J. (continued)

2. (continued)

Joseph Hayden, Jr. for the defendant
80 River Road
Hoboken, New Jersey 07030
(201) 795-9681

K. My judicial experience in the criminal sector includes cases involving three capital homicides, conspiracy to violate gaming laws with wire taps, aggravated manslaughter, aggravated assault, burglary, theft, robbery, rape and arson. In the civil sector I have tried all types of personal injury actions arising out of automobile accidents, fall downs, varied contract and real estate matters, and a legal malpractice case.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

SEE APPENDIX C.

I have included therein both civil and criminal opinions to demonstrate the diversity of matters I have handled.

16. Public Office: State (chronologically) and public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Legislative Aide to then Senator Matthew J. Rinaldo, New Jersey State Senate, (1970-1972)

Special Assistant Prosecutor, Union County (June and July, 1970)

Attorney to the Roselle Board of Adjustment (1965-1971)

Municipal Prosecutor for the Town of Westfield, New Jersey (1973-1974)

Congressional Field Representative, 12th Congressional District - Congressman Matthew J. Rinaldo (1972-1979)

All of the above offices were appointed. I have never sought elective public office.

17. Legal Career:

A. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

NO.

2. whether you practiced alone, and if so, the addresses and dates;

From April 8, 1960 until October 1970 I practiced in association with my father, George W. Wolin, at 1143 East Jersey Street, Elizabeth, New Jersey.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

October 1970 - 1971: Muscatello, Wolin and Garrubbo, a law firm with offices located at 567 Morris Avenue, Elizabeth, New Jersey (Partner)

1972 - 1978: Wolin and Garrubbo, a law firm with offices located at 567 Morris Avenue, Elizabeth, New Jersey (Partner)

1978 - 1980: Read, Wolin, Garrubbo and Span, a law firm with offices located at 567 Morris Avenue, Elizabeth, New Jersey and at 435 East Broad Street, Westfield, New Jersey 07090 (Partner)

B. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

1960-1965 - I appeared in most courts of limited jurisdiction handling commercial collections, landlord-tenant obligations, and other varied matters appropriate to these courts. The latter category would include property damage and personal injury actions as well as traffic violations. During this period of time I developed an interest in criminal matters and volunteered for assigned criminal cases. Two of the criminal matters I was assigned to are reported cases. They are as follows:

State v. Alfred Ravenell,
43 N.J. 148 (1964)

State v. Alfred Ravenell,
43 N.J. 171 (1964)

Each of these cases was a capital homicide case wherein I was designated as co-counsel with Calvin J. Hurd, Esq. Mr. Hurd was lead counsel in both of these matters. Calvin J. Hurd resigned as a member of the Bar. He currently has real estate management offices located at 1139 East Jersey Street, Elizabeth. His telephone number is (201) 354-8585.

Also during this period of time I was involved with non-litigated matters consisting of real estate closings, foreclosure actions, preparation of contracts, estate planning and administration of estates.

1965-1970 - During this phase of my career I continued to build on my experience gained in the initial segment of my practice and expanded it to include matrimonial cases and cases involving zoning and land use planning. During this period of time I received the following appointments:

Attorney to the Board of Adjustment
Borough of Roselle (1965 - 1971)

Chief Staff Attorney to the Legal
Aid Society of Union County (1965-1974)

Secretary to the Union County Ethics Committee
(1970 - 1977)

Also during this period of time my interest in criminal law continued to grow and I accepted pool assignments from the then recently enacted Office of the Public Defender, (See Appendix D). The most acknowledged of these cases was State v. Wayne Streeter, sub nom State v. Madden, 61 N. J. 377(1972) This was a capital homicide case wherein, after a four-month trial, my client was acquitted. Specific reference is made to pp. 394-395 (15). It was my objection to the aiding and abetting charge that first introduced the theory of conspiracy which brought about a reversal of this case by the New Jersey Supreme Court.

1970-1980 At this point in my career I was a partner in a law firm and my practice was evenly balanced between litigated and non-litigated matters. I had the primary responsibility for litigating equity or chancery matters, problems arising under the municipal land use law, and diverse corporate litigation in both the state and federal courts. I had co-equal responsibility for the conduct of matrimonial and criminal litigation. In the area of personal injury and property damage litigation my responsibility was secondary and in support of my partner, Joseph L. Garrubbo, Esq., who represented three insurance carriers. They were Aetna, Motor Club of America and Gateway Insurance Company. Approximately ten to twenty percent of my time was devoted to insurance carrier representation. In this supportive role I conducted depositions, issued evaluation reports to the carrier, attended settlement conferences and litigated jury cases to verdict. My non-litigation responsibility dealt with clients' problems arising out of corporate, commercial, real estate and probate matters.

17. (B) (1)
(continued)

I was often called upon to draft and prepare certificates of incorporation, specialized corporate documents including buy-sell agreements, employment and consultant contracts, and articles of dissolution.

Representative real estate transactions included examinations of title, attendance at closings, and preparation and presentation of applications before planning boards and boards of adjustment. On several occasions I was appointed by the courts to serve as a condemnation commissioner.

My probate experience includes the preparation of estate plans and their probate. I have also served as a court appointed administrator C.T.A., guardian ad litem in infant settlements, matrimonial sequestrator and custodial receiver.

During this period of time I received two additional appointments:

Special Assistant Prosecutor in and for the County of Union (June 3, 1970)
See Appendix D attached hereto and made a part hereof.

Municipal Prosecutor, town of Westfield
(1973-1974)

17. (B) (2)

Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My typical former clients were small corporations, churches and individuals who required legal service. See phase 1970-1980 in response to question 17 (b) (1) for greater detail. Two of them I choose to mention specifically because of my long association with them. They are:

1) Elizabeth Agency Group
136 Central Avenue
Clark, New Jersey 07066 (201)574-9000
President: Fred Sichel

I assisted this small corporation in its future planning and corporate acquisition program.

2) Bethany Baptist Church
275 West Market Street
Newark, New Jersey 07102 (201) 623-8161
Pastor: Reverend James Scott

Over a number of years I dealt with this church in the planning and construction of its new church edifice. My duties consisted of:

(a) site acquisition through HUD (34 parcels);
(b) examination of title;
(c) application and procurement of a $900,000 mortgage;
(d) negotiation of architect and building contracts;
(e) disbursement of funds during construction phase; and,
(f) procurement of certificate of occupancy and closing of permanent mortgage loan.

During my 20 years of practice prior to becoming a member of the New Jersey judiciary I developed a degree of specialization in the following areas:

1) Criminal and quasi-criminal litigation including the defense of persons charged with driving while intoxicated.

2) Construction and/or acquisition of church edifices (8).

3) Municipal land use litigation.

4) Sales of small businesses and corporate acquisitions.

17. (C)(1) **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

From the diversity of litigation as aforestated, I appeared in court on a regular basis.

(2) **What percentage of these appearances was in:**

1) Federal Courts - 1%
2) State - courts of record - 80%
3) Other courts - 19%

(3) **What percentage of your litigation was:**

1) Civil? 75% 2) Criminal? 25%

(4) **State the number of cases in courts of record you tried to verdict of judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

Due to the unavailability of any records from 1960 - 1970 and limited availability of records from 1970 until my judicial appointment, I would approximate that I tried 100 cases to a verdict. Excluded from this calculation are literally hundreds of small collection and landlord-tenant cases. Included are criminal cases, municipal land use litigation, personal injury litigation - plaintiff and defendant, matrimonial and miscellaneous real property and probate matters.

In all of these cases I was sole counsel except for two capital homicide cases reported in answer to question 17 (b)(1) infra.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, address, and telephone numbers of the co-counsel and of principal counsel for each of the other parties.

(1) State v. Wayne Streater, sub nom State v. Madden, 61 N. J. 377 (1972). During serious racial rioting in Plainfield, New Jersey a police officer was murdered by a mob who inflicted a savage beating on him. Twelve persons were indicted for the murder. My client was found not guilty by the jury.

(A) The case commenced in September 1968, the day after Labor Day, and terminated in late December of that year.

(B) It was tried in the Superior Court-Criminal Division before the Honorable Chester A. Weidenburner.

(C) Co-counsel were:

1. Melvin J. Whitken
570 West Mount Pleasant Avenue
Livingston, New Jersey 07039
(201) 994-0904

2. Joseph Barbieri
(deceased)

3. Roger Conant
(deceased)

4. William Wright, Jr.
172 Halstead Street
East Orange, New Jersey 07018
(201) 672-8153

5. Melvyn H. Bergstein
Box 5600
Woodbridge, New Jersey 07095
(201) 549-5600

6. Conrad N. Koch
204 Eagle Rock Avenue
Roseland, New Jersey 07068
(201) 226-7300

7. Robert J. Cardonsky
125 Broad Street
Elizabeth, New Jersey 07201
(201) 353-6500

8. Richard J. Zeitler
1107 St. Georges Avenue
Colonia, New Jersey 07067
(201) 388-3150

9. Michael A. Posnock
453 North Wood Avenue
Linden, New Jersey 07036
(201) 486-1713

The Prosecutor was:

Raymond S. Londa
277 North Broad Street
Elizabeth, New Jersey 07208
(201) 353-5600

2. Fein v. Chrysler Motor Corporation. This was a product liability case that involved an alleged defective brake pedal. My client's brakes failed and she sustained personal injury. Verdict was in favor of the defendant.

(A) It was tried in the mid to late 1960's. Approximately a 5 day trial.

(B) Superior Court of New Jersey before a jury with the Honorable Milton A. Feller presiding.

(C) Neil Reiseman
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 992-9300

3. Turner v. Unknown. This was a personal injury action wherein my client's child was attacked by a dog and sustained personal injury. Verdict was in favor of the plaintiff.

(A) It was tried in the mid 1960's. Approximately a 3 day trial.

(B) Union County Court of New Jersey. Either Carroll Hopkins or Julius Kwalick was the presiding judge. Both are deceased.

(C) Harold Ruvoldt, Jr.
2 Cook
Jersey City, New Jersey 07306
(201) 420-1050

18 (continued)

4. Jack Field v. Township of Franklin, Franklin Citizen for Orderly Planning and Emmett Wilson. This litigation arose out of plaintiff's application for permission to build a 2,700 unit planned development. I represented Emmett Wilson before the planning board, the township committee, and in an action filed in the Superior Court. This case projected significant environmental issues. Because of the preparation in opposition to the application, my client was offered six acres as a land buffer and was subsequently dismissed as a party defendant.

   A. Court proceedings were in late 1970's.

   B. Superior Court of New Jersey (Somerset County) Honorable Michael Imbriani

   C. Counsel were as follows:

      1. David J. Frizzell
         296 Amboy Avenue
         Metuchen, New Jersey 08840
         (201) 494-3500

      2. Thomas C. Jamieson, Jr.
         300 Alexander Park
         Princeton, New Jersey 08540
         (609) 452-0808

      3. Peter J. Selesky
         22 Kirkpatrick
         New Brunswick, New Jersey 08903
         (201) 846-8000

      4. John P. Sheridan, Jr.
         Headquarters Plaza II
         Morristown, New Jersey 07960
         (201) 538-0800

5. William Peterson v. Rotary Metal Slitting Company, Inc. et als. This was a suit by a disgruntled shareholder commenced by a complaint with an order to show cause seeking restraints and ultimate dissolution of the corporation. I represented the corporate defendant. Restraints were denied and the matter was successfully resolved through the sale of my client's corporate holdings to plaintiff.

   A. 1977

   B. Superior Court of New Jersey (Union County)

   C. Theodore Criares, Esq. (No current listing in Lawyers Diary).

18. (continued)

6. Nayibe Pena Imports, Inc. v. City of Elizabeth. This was an appeal from a denial of a variance by the City of Elizabeth. The significant issue was whether in rejecting the variance, the city had failed to weigh the economic revitalization that it experienced from the influx of the Cuban Community. By this appeal I tried to expand traditional notions of zoning to include an economic revitalization factor as a special reason for the grant of a variance.

   A. 1977 - two days

   B. Superior Court of New Jersey (Union County)
   Honorable Milton A. Feller

   C. Luis Bello
   7 Bridge Street
   Elizabeth, New Jersey 07201
   (201) 355-0966

7. Harrison T. Barrow and Elizabeth Barrow v. Frank Ditullio and Greta Ditullio. This was a mortgage foreclosure action that contained complex questions regarding priority of liens. I represented the defendant Ditullio who was dismissed as a defendant after the granting of his motion for summary judgment.

   A. 1977

   B. Superior Court of New Jersey-Chancery Division (Ocean County) Honorable Henry H. Wiley

   C. Harrison Barrow, Esq. (deceased)

   Daniel Gallop, Esq. (suspended from the practice of law)

8. Earlman v. Earlman. This was a heated matrimonial matter involving extensive discovery and complex tax questions. I represented the defendant husband.

   A. Two day trial. Date unknown.

   B. Superior Court of New Jersey (Middlesex County)
   Honorable Joseph Takacs

   C. Libby E. Sachar, Esq.
   320 Park Avenue
   Scotch Plains, New Jersey 07076
   (201) 322-2333

18. (continued)

The two most significant litigated cases that I handled were filed in the United States District Court of New Jersey and assigned to the calendars of the Honorable Frederick Lacey and the Honorable Curtis H. Meanor. Though they did not proceed to verdict, they are reflective of the type of trial preparation I engaged in on behalf of my clients. These cases were as follows:

9. Thul Engine and Equipment Company v. Dico Co.,Inc., Garden State Engine and Equipment Co., Frank Spallutto; Paul Baldasarre and Kevin Roberts.

August 14, 1978 - Filed in the United States District Court of New Jersey, Docket Number 78-1942 - I represented the plaintiff who alleged that Dico and Garden State Engine had engaged in anti-competitive conduct in violation of the Sherman Anti-Trust Act, 15 U.S.C.A. §2 and the Robinson-Patman Act, 15 U.S.C.A. §§ 2e-2f. The complaint also contained fourteen common law counts in the nature of tortious interference with prospective economic advantage. After significant discovery proceedings and prior to trial this case was resolved due to a failure of plaintiff's proofs. In essence, the allegations of my client that his dealership of Dico products was terminated improperly were untrue and what remained was a garden variety dealer termination case. The case was settled with a cash payment to plaintiff.

The attorneys involved in this litigation were as follows:

1. Dico Co. Inc. -

   Theodore L. Abeles, Esq.
   103 Eisenhower Parkway
   Roseland, New Jersey 07068

2. Garden State Engine and its principals Spalluto and Baldasarre

   Frederick L. Whitmer, Esq.
   163 Madison Avenue
   Morristown, New Jersey 07060
   (201) 267-3333

3. Kevin Roberts -
   Norman Abrams, Esq.
   1550 Park Avenue, South
   Plainfield, New Jersey 07080
   (201) 754-9200

18. (continued)

10. Martin Warshaw v. Bache, Halsey, Stuart Shields and Company, Inc. Docket Number 79-2375

This case alleged various violations of the Securities Act of 1933 and the Securities Exchange Act of 1934. It also contained allegations of common law fraud and violations of the New Jersey Consumer Fraud Act.

My client was involved in the sale of naked options. The defendant failed to provide my client with material information with regard to option trading thereby causing him to suffer a substantial loss. After extensive discovery and depositions this matter was settled favorably for my client. Due to frailties in my client's personal profile a trial was not in his best interest. The significance of the case was that most prior case law was in favor of defendant-brokers.

Counsel for the defendant Bache, Halsey, Stuart Shields, Inc. was:

Benjamin Michel, Esq.
Headquarters Plaza I
Speedwell Avenue
Morristown, New Jersey 07960

In this case I was assisted by:

Bernard S Meislin, Esq.
73 Athens Road
Short Hills, New Jersey 07078
(201) 376-3713

Mr. Meislin was knowledgeable on SEC law and assisted me with legal research and the drafting of the complaint.

18. (continued)

11. Another case that is reflective of my experience is:

P. J. Charlton's, Inc., v. Carlin Clothes et al.
This was a suit brought by my client a retailer of men's clothing who was barred from purchasing certain lines of clothing due to threats and intimidation by the principal of the defendant, Carlin Clothes. Carlin Clothes was a successful retail operation with approximately five stores and through its purchasing power was able to persuade some of its suppliers not to deal with the plaintiff. The plaintiff's principal was a former employee of Carlin Clothes. The complaint named Carlin Clothes and various suppliers of men's clothing. It was initiated in the state courts pursuant to the state anti-trust law and contained counts of common law interference with prospective economic advantage. Substantial discovery and depositions resulted in a settlement that included reimbursement for counsel fees and access to the prohibited lines of clothes.

A. Suit instituted on April 21, 1977.

B. Superior Court of New Jersey - Chancery Division. The Honorable Harold A. Ackerman heard all applications and participated in settlement negotiations.

C. Counsel were as follows:

1. Carlin Clothes - Robinson, Wayne and Greenberg
by Stephen Greenberg and Paul Linker, Esqs.
Gateway
Newark, New Jersey 07102
(201) 621-7900

NOTE: Mr. Greenberg has since withdrawn from the firm and his current address is:
1180 Raymond Boulevard
Newark, New Jersey 07102
(201) 621-9020

2. Botany 500 Inc.,- Hannoch Weisman by
James J. Shrager
4 Becker Farm Road
Roseland, New Jersey 07068
(201) 535-5315

18. (continued)

11. (continued)

3. St. Andre Clothes, Inc.-
Nathan Beck, Esq.
880 Bergen Avenue
Jersey City, New Jersey 07306
(201) 795-2600

4. Drummond Knitwear, Ltd.
Abner W. Feinberg, Esq.
880 Bergen Avenue
Jersey City, New Jersey 07306
(201) 795-2600

12. A last case that I wish to present is Kuhl v. Kuhl. This was a contested matrimonial matter with complex tax issues that was resolved favorably to all parties. My opposing counsel was:

Harold Friedman, Esq.
17 Academy Street
Newark, New Jersey 07102
(201) 623-3600

19. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)**

In Appendix D, attached hereto and made a part hereof, are several staff action reports reflecting criminal cases I tried as a special assistant prosecutor during June and July 1970. The attorneys who participated in these cases were as follows:

Michael B. Blacker
1824 Front Street
Scotch Plains, New Jersey 07076
(201) 322-6222

Steven C. Rother
120 South Wyoming Avenue
South Orange, New Jersey 07079
(201) 763-4129

Kenneth S. Javerbaum
966 South Springfield Avenue
Springfield, New Jersey 07081
(201) 379-4200

John L. McGuire, Jr.
525 Millburn Avenue
Short Hills, New Jersey 07078
(201) 467-3460

Hon. Miriam N. Span
Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07207
(201) 567-4166

Edward S. Snyder
3 Becker Farm Road
Roseland, New Jersey 07068
(201) 994-4442

Also contained in Appendix D are microfiche records of the Office of the Public Defender indicating cases assigned to me during calendar years 1968 through 1974.

As Chief Staff Attorney of the Legal Aid Society, I initiated and implemented the Union County Lawyer Referral Plan. As the Presiding Judge of the Criminal Part of the Union County Superior Court, I conceived and implemented the Amended Speedy Trial Plan that was effectuated on February 1, 1986.

II. FINANCIAL DATE AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   NONE.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

   Any potential conflict of interest would be resolved by termination of the existing relationship to eliminate the conflict. If the conflict centered on any type of financial involvement or investment, then the involvement or investment would be immediately liquidated.

   As a member of the judiciary, any potential conflict of interest has been handled by full disclosure and recusal when required. If confirmed as a United States District Court Judge, I would continue my practice of full disclosure and recusal.

   There are no categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during my initial service as a Judge of The United States District Court.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

   NONE.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)**

4. **(continued)**

As to Alfred M. Wolin:

Salary

1986 - 76,858

1987 - 55,322 (year to date 8/14/87)

N.J. Div. of Pensions

1986 - $341

Miscellaneous Interest Income

Life Insurance - $296

As to Jane Z. Wolin

Salary

1986 - 56,371

Dividend Income - 1986

Time Incorporated -	$ 115
Legg Mason Case Reserve -	1701
R. P. Scherer Corporation -	240
Legg Mason	222
Total	$2278

Capital Gain - 1986

Amdahl Corporation - (500 shares) - $3,738

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

See schedule attached together with rider(s).

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

No. During my years of association with Congressman Matthew J. Rinaldo and prior to my appointment to the Superior Court of the State of New Jersey, I peripherally supported his campaign but never assumed a major role.

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional worklaod, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific intances and the amount of time devoted to each.**

UNION COUNTY BAR ASSOCIATION

Aside from the offices held in this association, I served as chief staff attorney to the Union County Legal Aid Society (1964-1974) and as secretary to the Union County Ethics Committee (1970-1977). I also initiated and administered the Lawyer Referral program in Union County. Each of these positions required me to interface with the public to insure that their legal rights were protected and that they received equal justice uner law.

JUDICIAL ACTIVITIES

I serve on several committees whose function is directed towards delay reduction of pending cases. In my current judicial assignment, I preside over the criminal courts of Union County and have innovated and initiated several programs that enure to the benefit of those charged with crime.

MISCELLANEOUS

Prior to the advent of the Public Defender's Office, I regularly accepted pro bono court appointed representation of indigent defendants charged with crime.

I also served as a guest lecturer on numerous occasions for a program then called WIN. This was federally funded and assisted disadvantaged women in coping with their problems directed towards eventual entry into out of home employment. My participation was to advise them of their legal rights.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates-- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?**

NO.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

None that I am aware of. Initally I received a call from the Department of Justice (Seth Liebowitz) inquiring as to my interest in serving as a Judge of The United States District Court. Sometime thereafter, I visited The Department of Justice and was interviewed by several staff members. It was a plesant experience and at no time was I subjected to a "litmus test" of my views. Most of the interviews centered on my legal and judicial experience.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.**

No.

5. **Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

5. (continued)

My focus on judicial activism commences with a deep and abiding respect for the United States Constitution and the separation of powers doctrine. Through this check and balance process, each of these constitutionally authorized branches of government have for the most part, accomplished their purposes as the framers of the constitution intended. Accordingly, a court should not implicate a right that has no statutory or constitutional origin nor should it by judicial fiat establish that right. Formulation of laws is a legislative function entrusted to those with direct accountability to the electorate. Similarly, implementation of existing law is an executive prerogative and should be reserved for the executive branch of government.

A judge's role is one of dispute resolution. Through the interpretive process, a judge should confine his/her determination to the issues before the court. Expansive decisions broader than required are of unanticipated and imprecise precedential value, constitute a disservice to the litigants and expose the judiciary to unnecessary criticism. Problem solution across the broad spectrum of society is generally inappropriate and invasive of the other co-equal institutions of government. An individual party litigant should not be used as a fulcrum to initiate or implement social or economic change where the reasonable minds of concerned individuals may differ.

Lastly, a judge's personal values and moral judgments must be subordinate to the Constitution of the United States. Though the constitution is a "living and breathing" document subject to wide interpretation, the interpretive aspect of a judge's decision is obligated to be disassociated from private feelings when such feelings are inconsonant with sound constitutional construction.

PUBLISHED OPINIONS

(1) Cernadas v. Supermarkets General, 192 N.J. Super. 500 (1983).

(2) State v. Lyons, 194 N.J. Super. 616 (1984), aff'd, 211 N.J. Super. 403 (1986).

— Case questioned in State v. Haskell, 195 N.J. Super. 235 (1984); Case criticized in State v. Haskell, 100 N.J. 469 (1985).

(3) State v. Sheppard, 196 N.J. Super. 448 (1984)

(4) State v. Schlanger, 197 N.J. Super. 548 (1984)

(5) State v. Alexander, 198 N.J. Super. 594 (1984)

—Case overruled in State v. Valentin, 208 N.J. Super. 536 (1986); Case questioned in State v. Valentin, 105 N.J. 14 (1987).

(6) State v. Schlanger, 203 N.J. Super. 289 (1985).

(7) State v. Halsey, approved for publication June 2, 1987.

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

AS OF JULY 22, 1987

ALFRED M. WOLIN and JANE Z. WOLIN

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	34,250 --		Notes payable to banks—secured	---	
U S Government securities—add schedule	---		Notes payable to banks—unsecured	---	
Listed securities—add schedule	22,700 --		Notes payable to relatives	---	
Unlisted securities—add schedule			Notes payable to others	3,445	
Accounts and notes receivable:	---		Accounts and bills due	---	
Due from relatives and friends			Unpaid income tax	---	
Due from others			Other unpaid tax and interest		
Doubtful			Real estate mortgages payable—add schedule	148,389 50	
Real estate owned—add schedule	375,000 --		Chattel mortgages and other liens payable		
Real estate mortgages receivable	---		Other debts—itemize:		
Autos and other personal property	50,000 --				
Cash value—life insurance	35,000 --				
Other assets—itemize:					
1000 Silver Dollars	7,500 --				
IRA - Alfred M. Wolin	28,000 --		Total liabilities	151,834 50	
IRA - Jane Z. Wolin	28,000 --		Net worth	428,615 50	
Total assets	580,450		Total liabilities and net worth	580,450 --	
CONTINGENT LIABILITIES			**GENERAL INFORMATION**		
As endorser, comaker or guarantor	100,000 --		Are any assets pledged? (Add schedule.)	NO	
On leases or contracts	100,000 --		Are you defendant in any suits or legal actions?	NO	
Legal Claims			Have you ever taken bankruptcy?	NO	
Provision for Federal Income Tax					
Other special debt					

RIDER

TO

CONFIDENTIAL FINANCIAL STATEMENT

I. ASSETS

A. LISTED SECURITIES:

1. R. P. Scherer - 1000 shares
NASDAQ - National Market
Price - 17 ($17,000.00)

2. National Intergroup Inc. - 300 shares
NYSE - Price - 19 ($5,700.00)

B. REAL ESTATE OWNED:

1. On May 28, 1986 my wife and I purchased our current residence at 9 Cambridge Drive, Warren, New Jersey in the amount of $275,000.00. Since then we have been involved in the construction of a substantial addition.

(a) Current estimated value is $375,000.00

(b) Value upon completion, October, 1987 - $500,000.00

C. IRA - ALFRED M. WOLIN

In addition to the mutual funds contained therein, that account possesses treasury bond receipts SER 5 - INT PMT 11.875% 2003 Treasury Bond 11-15-97 Approximate value is $1,635.

D. IRA - JANE Z. WOLIN

Consists of Legg Mason Value Trust Inc., 100 shares of Martin Marietta Corp., and an AT&T fund created when the original corporation separated from the regional operating companies.

RIDER

TO

CONFIDENTIAL FINANCIAL STATEMENT

II. LIABILITIES

A. REAL ESTATE MORTGAGE

Our current mortgage balance is $148,389.50. We have an outstanding mortgage commitment with Union County Savings Bank in the amount of $225,000.00 which I anticipate closing on August 5, 1987. The proceeds of that loan will be used to satisfy the existing mortgage lien and complete the construction contract listed INFRA as to contingent liabilities.

III. CONTINGENT LIABILITIES

A. AS GUARANTOR

Our son Marc E. Wolin, age 24, has contracted to purchase a townhouse in Bridgewater, New Jersey for approximately $132,000 - $135,000. He has applied for a mortgage loan in the amount of $100,000. A commitment was issued subject to his parents signing as guarantors. We are not obligated nor are we supplying any of the closing proceeds.

B. AS TO CONTRACT

In connection with the construction project at our present residence, we entered into an agreement with Don-Jon Builders, Inc., in the amount of $130,000. To date we have advanced $34,200 in satisfaction of that agreement. The remainder will be satisfied from the balance of mortgage closing proceeds, cash on hand and listed securities.

SCHEDULE OF INSURANCE

AS OF JULY 24, 1917

I. FEDERAL LIFE INSURANCE COMPANY

A. Policy No. 0305749
Face Amount - $10,000

Cash Value	$ 4,226.80
Dividends	516.29
Spec. Dividend	307.26
Net Total Value	$ 5,050.35

B. Policy No. 0354306
Face Amount - $10,000

Cash Value	$ 3,677.60
Dividends	804.68
Spec. Dividend	437.37
Net Total Value	$ 4,919.65

C. Policy No. 0318615
Face Amount - $10,000

Cash Value	$ 4,248.60
Dividends	517.08
Spec. Dividend	309.82
Less Loan	-1,173.39
Net Total Value	$ 3,902.11

D. Policy No. 0355378
Face Amount - $15,000 (TERM)

Dividend	$ 195.98
Spec. Dividend	268.22
Net Total Value	$ 464.20

II. THE GUARDIAN LIFE INSURANCE COMPANY

Policy No. 2225114
Face Amount - $50,000

Cash Value		$14,891.79
Dividends		7,255.28
Settlement Dividend		261.50
Less:		
Loan	2,286.37	
Int. Due	7.62	
Net Total Value		$20,114.58

SCHEDULE OF INSURANCE

AS OF JULY 24, 1987

III. CONN MUTUAL LIFE

Policy NO.		
Face Amount - $10,000		
Cash Value		$ 4,244.35
Dividend		1,874.42
Less:		
Loan	1,159.87	
Int. Due	53.31	
Net Total Value		$ 4,905.59

RECAP

FEDERAL LIFE	$14,336.31
GUARDIAN	20,114.58
CONN MUTUAL LIFE	4,905.48
NLT TOTAL VALUE	$39,356.48

CHAIRMAN
Harold R. Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112
FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101
SECOND CIRCUIT
William E. Willis
125 Broad Street
New York, NY 10004
THIRD CIRCUIT
Jerome J. Shestack
Suite [illegible]
1600 Market Street
Philadelphia, PA 19103
FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510
FIFTH CIRCUIT
Lloyd Lochridge
Suite 1300
919 Congress Avenue
Austin, TX 78701
SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215
SEVENTH CIRCUIT
Joan M. Hall
Suite 4300
One IBM Plaza
Chicago, IL 60611
EIGHTH CIRCUIT
James W. Hewitt
Post Office Box 80268
1815 Y Street
Lincoln, NE 68501
NINTH CIRCUIT
J. David Andrews
1900 Washington Building
Seattle, WA 98101
Samuel L. Williams
45th Floor
355 South Grand Avenue
Los Angeles, CA 90071
TENTH CIRCUIT
James A. Clark
Suite 1100
303 East 17th Avenue
Denver, CO 80203
ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Post Office Box 78
2 Dexter Avenue
Montgomery, AL 36101
DISTRICT OF COLUMBIA CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 I Street, NW
Washington, DC 20006
FEDERAL CIRCUIT
John D. Lane
Suite 600
1666 K Street, NW
Washington, DC 20006
BOARD OF GOVERNORS LIAISON
Sharp Whitmore
2005 Gird Road
Fallbrook, CA 92028
STAFF LIAISON
Irene R. Emsellem
2nd Floor, South Lobby
1800 M Street, NW
Washington, DC 20036
(202) 331-2210
ABAINET ABA 461

AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

RECEIVED
OCT 16 1987
AMERICAN BAR ASSOCIATION
GOVERNMENTAL AFFAIRS OFFICE

October 14, 1987

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: ALFRED M. WOLIN
United States District Court
for the District of New Jersey

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Alfred M. Wolin for appointment as Judge of the United States District Court for the District of New Jersey.

A substantial majority of our Committee is of the opinion that Judge Wolin is "Well Qualified" for this appointment. The minority found him to be Qualified.

Sincerely yours,

Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

cc: Irene Emsellem

SAM R. CUMMINGS

Birth:	October 18, 1944	Lubbock, Texas
Legal Residence:	Texas	
Marital Status:	Married	Sally Lynn Cross 2 children
Education:	1963 - 1965	Texas Tech University B.B.A. degree
	1967 - 1970	Baylor University J.D. degree
Bar:	1970	Texas
Experience:	1970 - present	Culton, Morgan, Britain & White Associate 1970-1974 Partner 1974-present
Office:	1600 Texas American Bank Building 6th & Tyler Amarillo, Texas 79101 806 374-1671	
Home:	7113 Calumet Amarillo, Texas 79106	

To be United States District Judge for Northern District of Texas

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

   Samuel Ray Cummings

2. Address: List current place of residence and office address(es).

   Residence: 8016 Bedwell, Amarillo, Texas 79121

   Office: 1600 Texas American Bank Building
   Amarillo, Texas 79101

   Mailing Address: P. O. Box 189
   Amarillo, Texas 79105-0189

3. Date and place of birth.

   October 18, 1944, Lubbock, Texas.

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   Married to Sally Lynn Cross Cummings. My wife is not employed outside of the home.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   Texas Tech University, June 1963 to May 1967. B.B.A. Degree with a major in Finance and Economics granted June 3, 1967; Baylor University School of Law, June 1967 through February 1970. J.D. Degree granted February 26, 1970.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

   Since graduating from law school, I have been either an employee or partner of the law firm of Culton, Morgan, Britain & White in Amarillo, Texas.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

   None.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

   (a) The Dean's Honor Roll (every semester) at Texas Tech University; Highest Ranking graduate, School of Business Administration, Texas Tech University, spring, 1967. B.B.A. Degree, with High Honors.

(b) Wall Street Journal Award, American Jurisprudence Awards, and Judge Hunter D. Barrow Memorial Scholarship Award, Baylor University School of Law. J.D. Degree, Cum Laude.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association; State Bar of Texas; International Association of Defense Counsel; Texas Association of Defense Counsel; Chairman, District 13 Grievance Committee, State Bar of Texas; Fellow of the Texas Bar Foundation.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

Vice-President, South Amarillo Kiwanis Club; Committee Chairman of Troop 86, Boy Scouts of America, Amarillo, Texas; Member, Board of Trustees, Presbyterian Children's Home, Amarillo, Texas; Member, Board of Trustees, Howard Payne University, Brownwood, Texas.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the United States (August 21, 1975);

United States Court of Appeals, Fifth Circuit (March 7, 1973);

United States District Court, Northern District of Texas (November 17, 1970).

Supreme Court of Texas, and all Texas courts (May 18, 1970).

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. Last physical examination was June 8, 1987.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

N/A

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions

on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

N/A

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

After graduation from Baylor University School of Law, I was employed in May of 1970 by the Amarillo, Texas law firm of Culton, Morgan, Britain & White. This is an AV-rated firm that has been in practice since the 1920's. The firm, which presently has twenty-one attorneys, is a general practice firm that handles litigation, bankruptcy, real estate, oil and gas, probate, and taxation matters.

Since joining the Culton, Morgan firm, I have been involved in the litigation section, doing primarily insurance defense work.

In 1974, I became a partner in the Culton, Morgan firm.

My litigation experience has broadened to include commercial litigation, oil and gas litigation, products liability defense, defense of malpractice claims, and personal injury defense.

I have tried lawsuits in the trial and appellate courts of Texas, as well as in United States District Court and the United States Fifth Circuit Court of Appeals.

I am a member of the Texas Association of Defense Counsel and the International Association of Defense Counsel. I am a Fellow of the Texas Bar Foundation.

In December of 1981, I became Board Certified, Civil Trial Law, Texas Board of Legal Specialization.

I have served on the Compensation Committee, the Recruiting Committee, and the Management Committee of the Culton, Morgan firm.

For the past three years, I have served on the District 13 Grievance Committee, State Bar of Texas. I served as Chairman of this Committee during the past year.

I am an AV-rated attorney.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

See above.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I am Board Certified by the Texas Board of Legal Specialization in Civil Trial Law. Typical clients include the following: Santa Fe Energy Company, Amarillo, Texas; Russell Buick, Inc., Amarillo, Texas; Continental Insurance Company of North America, Dallas, Texas; Home Insurance Company, Dallas, Texas; Furr's, Inc., Lubbock, Texas; Travelers Insurance Company, Hartford, Connecticut; Kemper Insurance Group, Dallas, Texas; Providence Washington Insurance Group, Austin, Texas; Agricultural Workers Mutual Insurance Company, Fort Worth, Texas; General Motors Corporation, Detroit, Michigan; IBP, inc., Amarillo, Texas.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Frequently.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

(a) federal courts: 40%
(b) state courts of record: 60%
(c) other courts: none.

3. What percentage of your litigation was:

(a) civil;
(b) criminal.

(a) civil: 99%
(b) criminal: 1%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

During the last five years, I have tried to verdict or judgment thirty-two cases as sole or chief counsel and one case as co-counsel. This excludes non-contested matters. For the years prior to 1982, I have tried essentially the same number of cases during each five-year period as either sole counsel or chief counsel.

5. What percentage of these trials was:

(a) jury;
(b) non-jury.

(a) jury: 67%
(b) non-jury: 33%.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

First Case

a. Style, number, court and date.

"Mayo vs. Tri-Bell Industries, Inc.", No. CA2-82-061, U.S. District Court, Amarillo, Texas. Judge Mary Lou Robinson. Tried in November, 1984. Appealed to Fifth Circuit Court of Appeals. Opinion reported at 787 F2d 1007.

b. Brief summary and importance of the case.

I represented the Defendant, Tri-Bell Industries. Factually, the case dealt with a head-on collision between two tractor-trailer units. Three fatalities resulted. There were no eyewitnesses. The fact question dealt with which lane of traffic the impact occurred. The jury found the Plaintiffs' deceased husband-father was in the wrong lane of traffic and found him to be over 51% negligent.

The law question involved whether the Plaintiffs' nonpecuniary loss was barred by the provisions of the comparative negligence statute. The trial court held that Plaintiffs should take nothing. The Fifth Circuit Court of Appeals affirmed the trial court. As a result, the comparative negligence scheme as set out in the statute was applied to all of the damages claimed by the Plaintiffs in the case.

c. Name, address and telephone number of all counsel.

Opposing Counsel: Terry Hyatt and Darrell Panethiere, Law Offices of Windle Turley, P.C., 1000 University Tower, 6440 North Central Expressway, Dallas, Texas 75206. Telephone:(214) 691-4025.

Second case

a. Style, number, court and date.

"Edwards vs. An-Son Transportation Company, et al", No. 6377, 84th District Court, Ochiltree County, Texas. Judge J. E. Blackburn. Tried in March, 1983. Appealed to the Texas Seventh Supreme Court of Appeals, Cause No. 7-83-0204-CV. Affirmed by the Court of Appeals. Writ of Error refused, N.R.E., by the Supreme Court of Texas. Opinions not published.

b. Brief summary and importance of the case.

I represented the Defendant, An-Son Transportation Company. Factually, the case dealt with a head-on collision between an automobile and a tractor-trailer unit. The adverse driver of the automobile was killed. The jury found that the automobile was across the center stripe at the point of impact with the tractor-trailer unit. The driver of the automobile was found to be more than 51% negligent. The trial court rendered judgment that Plaintiffs take nothing.

The law question dealt with whether an automobile mechanic was qualified to testify as an accident reconstruction expert. The trial court would not allow the mechanic to give opinions on how the accident happened. The court of appeals affirmed the trial court. The importance of the case was that the appellate courts affirmed the longstanding rule that a showing must be made that a proposed expert has a requisite amount of education, experience or training in accident reconstruction, or the sciences such as physics, chemistry, or mathematics, before being allowed to give opinions concerning how an accident occurred.

c. Name, address and telephone number of all counsel.

Opposing counsel: Otis Shearer, 122 South Main Street, P. O. Box 348, Booker, Texas 79005. Telephone: (806) 658-4545.

Third Case

a. Style, number, court and date.

"Holtman vs. Cornell & Company, et al". No. 24,805, 223rd District Court, Gray County, Texas. Judge Grainger McIlhany. Tried in October, 1986. Appeal pending.

b. Brief summary and importance of the case.

I represented one of the Defendants, Cornell & Company. This was an accounting malpractice case. The facts were undisputed that the accountant failed to make the proper application for a partnership accounting period on a fiscal

year-end basis. Additional taxes were assessed the partnership, which formed the basis for damages claimed by Plaintiffs. The jury returned a verdict for the Plaintiffs. The trial court rendered judgment for Plaintiffs.

The law question involves whether the two-year statute of limitations has barred the Plaintiffs' cause of action. It is undisputed that suit was filed more than two years after the date of additional tax assessment by the IRS. Plaintiffs argue that the applicable statute of limitations as codified in the new Civil Practice and Remedies Code is a four-year statute. Defendants maintain that the two-year statute of limitations applies to this case.

c. Name, address and telephone number of all counsel.

Opposing Counsel: John Warner, 119 East Kingsmill Street, P. O. Box 645, Pampa, Texas 79065. Telephone: (806) 669-3397.

Counsel for Co-Defendant: Ben L. Sturgeon, 1501 Texas American Bank Building, Amarillo, Texas 79101. (806) 373-5992.

Fourth Case

a. Style, number, court and date.

"J. R. Lovell and Louva H. Lovell vs. Western National Life Insurance Company", No. 4474, 100th District Court, Donley County, Texas. Judge John T. Forbis. Tried in January, 1987. Appeal pending.

b. Brief summary and importance of the case.

I represented the Defendant, Western National Life Insurance Company. This was a suit brought for wrongful foreclosure on a 2,900-acre ranch situated in Donley County, Texas. The trial court entered an interlocutory summary judgment holding that there was a wrongful foreclosure because the holder of the note failed to make demand upon the original Trustee to resign prior to the appointment of a substitute Trustee, who eventually held the sale.

A jury trial was had on Plaintiffs' theories of breach of a duty of good faith and fair dealing, gross negligence, usury, exemplary damages, and attorney fees. The trial court granted the Defendant's Motion for Instructed Verdict as to the Plaintiffs' theory on breach of duty of good faith and fair dealing, gross negligence, and exemplary damages. The jury found the market value of the land in question to be what the Defendant's real estate appraiser had concluded. The jury found that there was accidental and bona fide error in reference to the sending of a demand letter for excessive interest.

The trial court rendered judgment solely on the wrongful foreclosure theory of the Plaintiffs and entered a judgment for minimal damages. However, the importance of the case is the fact that Defendant contends the foreclosure was not

wrongful and that the substitute Trustee had full authority to act pursuant to the express terms of the Deed of Trust.

c. Name, address and telephone number of all counsel.

Opposing counsel: Joe K. Longley, Longley & Maxwell, P. O. Box 12667, Capitol Station, Austin, Texas 78711. Telephone: (512) 477-4444.

Fifth Case

a. Style, number, court and date.

"Holt vs. Natural Gas Pipe Line Company". No. CA2-82-134, United States District Court, Amarillo, Texas. Judge Mary Lou Robinson. Tried in January, 1985. No appeal.

b. Brief summary and importance of the case.

I represented the Defendant, Natural Gas Pipe Line Company. Factually, this was a case of alleged trespass and negligence. Defendant had a pipeline right-of-way over the Plaintiffs' farm in Deaf Smith County, Texas. Because of a defective coating on the pipeline, much corrosion was taking place. Defendant found it necessary to go onto Plaintiffs' land, dig up the pipeline, and do the necessary repairs. Plaintiffs' claimed that the Defendants did not have the right to use as much land on either side of the pipeline as was in fact used. The jury found no negligence or trespass on the part of the Defendant. Accordingly, the trial court entered judgment that Plaintiffs take nothing.

This case was important because the Defendant was going to have to conduct the same type of repairs on many miles of pipeline in both Deaf Smith and Oldham Counties, Texas. The case was being closely watched by a number of potential Plaintiff-landowners. Because of the defense judgment, no additional cases have been filed against the Defendant.

c. Name, address and telephone number of all counsel.

Opposing Counsel: Earnest L. Langley, 140 East Third Street, Hereford, Texas 79045. Telephone: (806) 364-1100.

Sixth case

a. Style, number, court and date.

"Glen Dale Harrison, et al v. Benson-McCown & Company, et al". No. 24,697-C, in the 251st District Court, Randall County, Texas. Judge Naomi Harney. Tried in February 1987. Judgment entered March 13, 1987. Appeal pending.

b. Brief summary and importance of the case.

I represented the original Defendant, Benson-McCown & Company. Factually, this was a lawsuit brought by the Plaintiffs, who were the owners of the royalty interest on an oil and

gas lease situated in Noble County, Oklahoma. Suit was brought against the operator of the oil and gas lease. Benson-McCown & Company brought in as Third-Party Defendants Mid-Plains Petroleum Company and Texaco Trading and Transportation Company. Mid-Plains was the purchaser of the oil, and Texaco Trading and Transportation was the transporter who hauled the oil.

Plaintiffs contended that they had been damaged in excess of $500,000.00 by reason of negligence and breach of contract on the part of the operator in allowing unauthorized removal of oil from the tank batteries. In addition, the Plaintiffs sought punitive damages for an additional $500,000.00.

Benson-McCown & Company denied that there was any oil taken from the leased premises on an unauthorized basis; however, if there was such oil taken, it was taken due to the negligence on the part of the purchaser or transporter of the oil.

The jury found no negligence or breach of contract on the part of the Defendant. Accordingly, the trial court entered judgment that Plaintiffs take nothing. This case was important because the case was being watched by land owners and royalty owners on other leases in Noble County, Oklahoma, who were potential Plaintiffs in lawsuits against other operators.

c. Name, address and telephone number of all counsel.

Plaintiffs' counsel: Steven D. Harrison, KERRY, HARRISON, BROWN, LEWIS & STECK, 715 Ryan Plaza Drive, Suite B, Arlington, Texas, 76011, telephone (817) 861-5500; and Marvin W. Jones, GIBSON, OCHSNER & ADKINS, 500 First National Bank Building, Amarillo, Texas 79101. Telephone: (806) 378-9711.

Counsel for Texaco Trading and Transportation Company: Sharon Kimball, WHITTENBURG, WHITTENBURG & SCHACHTER, 12th Floor, Plaza Two, Amarillo, Texas 79101. Telephone: (806) 372-5671.

Counsel for Mid-Plains Petroleum Company: Gary W. Barnard, STOKES & FIELDS, Suite 400, Plaza Two, Amarillo, Texas 79101. Telephone: (806) 374-5317.

Seventh case

a. Style, number, court and date.

"Patterson vs. Linda Hale, et al". No. 2928, 69th District Court, Hartley County, Texas. Judge Bill Sheehan. Tried in June 1984. No appeal as to my client.

b. Brief summary and importance of the case.

I represented the Defendant, Quality Care Nursing Services. Factually, this was a case of medical malpractice. Plaintiffs sued for

the death of their minor child. Plaintiffs alleged that the death was caused by an overdose of IV solution administered by the charge nurse under the direction of the treating doctor.

The charge nurse was an employee of my client, Quality Care Nursing Services, which contracted with hospitals to provide nursing staff on a short-term basis.

The factual and legal question as to my client was whether or not my client had the right of control of the charge nurse at the time she was attending the patient in question. The jury found that Quality Care Nursing Services did not have the right of control of the details of the work of the nurse, but rather the hospital had that right of control. As a result, the Plaintiffs recovered nothing as against my client. Additionally, the jury found no negligence on the part of the charge nurse, but rather found negligence on the part of the hospital and doctor.

This case was an important case because of the legal question concerning right of control as between a hospital and a contracting nursing service. In this part of the State of Texas, many rural hospitals contract with nursing services to provide nursing staff in order to supplement the regular staff at the hospitals.

c. Name, address and telephone number of all counsel.

Plaintiffs' counsel: Jim B. Brown, 1404 4th Ave., Canyon, Texas 79015.
Telephone: (806) 655-7118.

Attorney for Linda Hale: Frank E. Murchison, III, Carr, Evans, Fouts & Hunt, 9th Floor, RepublicBank Bldg., P. O. Box 2585, Lubbock, Texas 79408-2585. Telephone: (806) 765-7491.

Attorney for Dr. Diwan: Richard Stokes, Jr. (Deceased).

Attorney for Coon Memorial Hospital: Wayne Sturdivant, Gibson, Ochsner & Adkins, 500 First National Bank Bldg., Amarillo, Texas 79201. Telephone: (806) 372-4271.

Eighth case

a. Style, number, court and date.

"Stubbs, et al vs. Norsub, Inc., et al". No. CA2-83-96, In the United States District Court, Amarillo, Texas. Judge Mary Lou Robinson. Tried in May, 1985 with a hung jury. Retried in August 1985 with a judgment entered August 26, 1985.

b. Brief summary and importance of the case.

I represented the Defendants Norsub, Inc. and Joseph McGraw. Factually, this was an intersection collision between a tractor trailer unit and an automobile in Hereford, Deaf Smith County, Texas. The Plaintiffs were suing for

personal injuries. The Plaintiffs contended that the Defendant's driver pulled in front of Mr. Stubbs from a side street and thereby caused the collision. The Defendants contended that Mr. Stubbs was coming from the opposite direction and turned in front of the Defendant's driver.

Both sides relied on accident reconstructionists to support their respective positions. The importance of the case from the Defendants' standpoint was that the Defendants used the investigating highway patrolman as an accident reconstruction expert, even though the highway patrolman had no advanced education in any sciences, engineering or mathematics. The court allowed the highway patrolman to give opinions in reconstructing the accident based solely upon his knowledge, training and experience as a highway patrolman. The use of the investigating officer as a reconstruction expert represented an expansion of the use of such testimony. Heretofore, such reconstruction experts had to be generally qualified in the sciences, such as physics, mathematics, chemistry, or engineering.

Verdict was ultimately rendered in favor of Plaintiffs. No appeal was taken from the trial court's judgment.

c. Name, address and telephone number of all counsel.

Plaintiff's counsel: Barbara L. Emerson and James E. Elliott, Witherspoon, Aikin & Langley, 140 E. 3rd Street, P. O. Box 1818, Hereford, Texas 79045-1818. Telephone: (806) 364-1100.

Ninth case

a. Style, number, court and date.

"Cantrell vs. Gilley's Enterprises, Inc., et al". Cause No. 62,743-A, in the 47th District Court of Potter County, Texas. Judge Bryan Poff. Summary judgment entered May 31, 1983, and

"Allison vs. Gilley's Enterprises, Inc., et al". Cause No. 62,677-A, in the 47th District Court of Potter County, Texas. Judge Bryan Poff. Summary judgment entered May 31, 1983.

b. Brief summary and importance of the case.

These are companion cases in which I represented the Defendants. Factually, these cases were brought by Plaintiffs asserting personal injuries as a result of riding a mechanical bull in the nightclub of the Defendant, Gilley's Enterprises. The Defendant in each case asserted an absolute defense of assumption of risk, by the reason of the fact that each Plaintiff had signed a written release prior to getting on the mechanical bull, in which there was language stating that the rider assumed the risk of all injuries resulting from riding the mechanical bull. The trial court granted summary judgments for the Defendants in each case.

These cases were important because the trial court held that the assumption of risk defense was an absolute bar to Plaintiffs' recovery. Shortly after these cases were resolved through summary judgments, the Supreme Court of Texas changed the law so as to nullify the assumption of risk defense as an absolute bar. This defense now is one of comparative causation or comparative negligence on which a percentage of fault can be allocated by the finder of fact. These two cases are probably the very last cases in Texas where an assumption of risk defense served as an absolute bar in cases based on negligence.

c. Name, address and telephone number of all counsel.

Opposing counsel: Tom Upchurch, Jr. & Associates, Jay Harvey, 3310 I-40 West at Julian, Amarillo, Texas 79102.
Telephone: (806) 355-8925.

Tenth case

a. Style, number, court and date.

"Houston General Insurance Company v. Allsup's Convenience Stores, Inc.". No. CA-2-83-200, in the United States District Court, Amarillo, Texas. Tried to the court in October 1985. Judgment entered November 20, 1985. No appeal.

b. Brief summary and importance of the case.

I represented the Defendant, Allsup's Convenience Stores, Inc. This suit was filed by the insurance company seeking recovery of additional premiums claimed to be due and owing under multi-purpose general liability insurance policies. Plaintiff claimed additional premiums due pursuant to a gross receipts audit in which gasoline sales were included as part of sales.

The Defendant contended that gasoline sales were not properly included in gross receipts for purposes of calculating the premium, for the reason that the gasoline was never owned by the Defendant. The Defendant merely was a consignee of the gasoline which was sold at the Defendant's convenience store locations. After a non-jury trial, the Trial Court entered judgment that Plaintiff take nothing.

This case was important because the Defendant had over 200 convenience stores which were involved in this gross receipts audit. Should the Plaintiff have prevailed in this case, then the Defendant would have been subject to other lawsuits by subsequent insurance carriers for additional premiums due.

c. Name, address and telephone number of all counsel.

Opposing counsel: William G. Eyres, 705 Carillon Tower East, 13601 Preston Road, Dallas, Texas 75240. Telephone: (214) 661-2207.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

(1) As a civil trial specialist, I have been engaged in defense work, involving primarily products liability, negligence, malpractice claims, real estate and mineral law matters. Significant litigation in recent years with which I have been involved, but which has not progressed to trial, has been in the area of asbestos exposure. I have defended approximately fifty of these cases.

(2) In the early to mid-1970's, I was involved in doing oil and gas title work, in addition to my trial work. Title opinions were rendered to major oil companies as well as small, independent producers. The title opinions covered primarily tracts of land situated in the Panhandle of Texas.

(3) In addition to trial work, I have been involved in contract review work for oil and gas clients, dealing with drilling operations and right-of-way acquisitions.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

There are no anticipated receipts as described above.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I know of no potential conflicts of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Executive Personnel Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have never held a major position or played a major role in a political campaign. However, in 1984, I was on the Campaign Committee for Congressman Beau Boulter. I had no particular title, and my responsibility was primarily to try to raise money for the campaign.

SF 278 (Rev. 1/95)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0042

Reporting Individual's Name	Assets and Income	Page Number		Schedule A
CUMMINGS, SAMUEL RAY				

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets								BLOCK C Income																		BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)								Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)										Actual Amount Only If "Other" Specified	Date (Mo., Day, Yr.) Only If Honoraria	If yes, complete Schd. B Part I for these assets including those sold for a loss.	
	None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
S or DC Examples: XYZ Common		X		X			X						ptnrshp income			X						$90,000			X
S or DC Examples: Doe Jones & Smith, Hometown, USA			X																								
1 Culton, Morgan, Britain & White, Amarillo, Texas					X								Partner-ship Income									$135,083.00 + $91,6[illegible]0.00 ytd			
2 500 shares Common Stock Ford Bank Group			X				X								X										
3 Certif. Deposit, Texas Amer. Bank, Amarillo, Texas						X			X										X						
4 Keogh Plan administered by Tex.Amer.Bank, Amarillo					X				X										X						
5 Mineral interest in ogm Hemphill County, Texas X													Royalty									$ 106.00			
6 DC Certif. Deposit, Tex. Amer. Bank, David A. Cummings				X					X								X								
7 DC Certif. Deposit, Tex. Amer. Bank, David A. Cummings, Trust				X					X								X								
8 DC Certif. Deposit, Tex. Amer. Bank, Julie L. Cummings				X					X								X								
9 DC Certif. Deposit, Tex. Amer. Bank, Julie L. Cummings, Trust				X					X								X								
10 IRA Cert. Deposit, Tex. Amer. Bank, Amarillo, Texas	X								X						X										

278-209

PREVIOUS EDITION USABLE

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks				Notes payable to banks—secured			
U.S. Government securities—add schedule	$ 15	000	00	Notes payable to banks—unsecured			
Listed securities—add schedule				Notes payable to relatives			
Unlisted securities—add schedule	20	000	00	Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid tax and interest			
Doubtful				Real estate mortgages payable—add schedule			
Real estate owned—add schedule				Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts—itemize: None			
Autos and other personal property	45	000	00				
Cash value—life insurance	17	224	00				
Other assets—itemize: IRA	1	739	00				
Certificate of Deposit	285	000	00				
Certificate of Deposit	62	250	00				
Keogh Plan	210	000	00	Total liabilities	--	0	--
Partnership in law firm	75	612	75	Net worth			
Total assets	$ 733	825	75	Total liabilities and net worth	$ 733	825	75
CONTINGENT LIABILITIES	--	0	--	GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule.)			
On leases or contracts				Are you defendant in any suits or legal actions?			
Legal Claims				Have you ever taken bankruptcy?			
Provision for Federal Income Tax							
Other special debt							

SAMUEL RAY CUMMINGS

and

SALLY LYNN CUMMINGS

SCHEDULE

(1) 500 shares of common stock owned in Ford Bank Group, valued at $40.00 per share.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Having served on the Grievance Committee of the State Bar of Texas for District 13 for the last three years, I have assisted many persons who are disadvantaged. The Grievance Committee attempts to resolve complaints filed against attorneys. In addition to imposing sanctions on attorneys, the Committee obtains restitution of fees paid for legal services which were either not rendered or rendered in such fashion as to be unethical.

As Chairman of the Grievance Committee this past year, I have spent numerous hours each month in telephone conferences with those wishing to file complaints. Additional time and effort have been spent in administering the Grievance Committee, including holding monthly meetings at which testimony is taken and resolutions made regarding pending complaints. Service on the Grievance Committee is rendered without compensation and is time donated for the betterment of the legal system and for the protection of those who have been disadvantaged because of unethical conduct on the part of attorneys.

As a practicing attorney for 17 years, I have dedicated my professional career to seeing that equal justice is done under the law so that disputes are resolved with reasonable results. I firmly believe in and have adhered to the concept that plaintiffs and defendants in civil cases and the government and defendants in criminal cases are entitled to a fair day in court. If parties are represented adequately, then I believe that the system does provide a forum in which controversies can be resolved and reasonable results achieved.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that individually discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies? If so, list with dates of membership. What have you done to try to change these policies?

I am not a member of any such organization, nor have I belonged to any such organization which, to the best of my knowledge, discriminates on the basis of race, sex or religion.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated.

Senator Phil Gramm has a Judicial Screening Committee composed of approximately twenty lawyers throughout the state. It is my understanding that this Screening Committee is bipartisan.

Approximately twenty persons applied for this position. The Committee, according to my understanding, interviewed ten or eleven of these applicants. I interviewed with the Committee in April, 1987. The Committee recommended me to Senator Gramm, along with one other applicant.

In the latter part of April, 1987, I interviewed with Senator Gramm in Washington. Approximately one week after my interview with Senator Gramm, I was notified by the Senator that he was recommending me to the President for nomination to the position of United States District Judge for the Northern District of Texas.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question. If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism".

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

In my view, the criticism that the Federal judiciary has engaged in "judicial activism" is not generally well-founded. There may be instances regarding particular judges in which observers feel that the judge has gone beyond constitutional limits. However, the federal judges that I have dealt with have not made a practice of exercising jurisdiction or issuing injunctions so as to impose broad affirmative duties on governments or society.

The Congress of the United States and the State Legislatures should be the primary source of the laws of this nation. The role of the judiciary, and particularly the role of the trial court, is to apply existing law as found in the Constitution, statutes, or case law, to the particular facts presented in each case.

It should be a rare instance for a trial court to be compelled to impose broad-reaching decrees or injunctions on governments, society, or broad classes of individuals. Such use of mandatory injunctions by the court should be done cautiously and carefully so as not to over-reach the role of the judiciary and become, in effect, a legislative body.

RECEIVED AUG 11 1987

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 1600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4100
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
701 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 Eye Street, N.W.
Washington, DC 20006

BOARD OF GOVERNORS
LIAISON
Sharp Whitmore
2005 Gird Road
Fallbrook, CA 92028

STAFF DIRECTOR
Wantland L. Sandel, Jr.
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5665

STAFF ASSISTANT
Diane Livingston
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5701

AMERICAN BAR ASSOCIATION **Standing Committee on Federal Judiciary**
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

August 5, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: SAMUEL RAY CUMMINGS
United States District Court
for the Northern District of Texas

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Samuel Ray Cummings for appointment as Judge of the United States District Court for the Northern District of Texas.

Our Committee is unanimously of the opinion that Mr. Cummings is "Qualified" for this appointment.

Sincerely,

Robert B. Fiske, Jr.

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members

CONFIRMATION HEARING ON: ROBERT S. GAWTHROP III, H. DEAN WHIPPLE, EDWARD F. HARRINGTON, AND WILLIAM S. ROSE, JR.

TUESDAY, NOVEMBER 17, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:10 a.m., in room SD-225, Dirksen Senate Office Building, the Hon. Patrick J. Leahy (acting chairman) presiding.

Also present: Senators Thurmond and Specter.

Staff present: Steven J. Metalitz, chief nominations counsel; Andrew Rainer, investigative counsel; Andrew Tartaglino, investigator; Robert J. Short, minority chief investigator; Frank Klonoski, minority investigator.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. The committee will come to order.

This morning, the Judiciary Committee will hold its 17th hearing to consider nominations to the lower Federal courts.

Are there people here from the Justice Department? Is there a representative of the Justice Department here? There is. Okay. This is the 17th hearing, in case you are taking notes.

Today, we will take testimony on four nominations. The first three nominations are for the district court: Robert S. Gawthrop III, for the Eastern District of Pennsylvania; Dean Whipple, for the Western District of Missouri; and Edward Harrington, for the District of Massachusetts. The fourth nominee is William S. Rose, Jr., of South Carolina, who has been nominated to be Assistant Attorney General for the Tax Division.

As we customarily do, we will hear first from Senators and Members of the House of Representatives, who wish to introduce nominees to the committee.

Before we begin these introductions, let me note for the record that each nominee before the committee today has completed an extensive questionnaire on his qualifications, experience and financial situation. The publicly available portions of these questionnaire responses will be printed in the record of this hearing.

We will also keep the record open for a limited time for follow-up questions of the nominees and for additional questions that may be submitted by members of the committee who are unable to be present this morning.

We will also include in the record the complete introductory statements of Senators, including those who are unable to attend personally due to scheduling conflicts. We will go until 12:05 today, and we will have to stop at that time, so I want all people to keep introductions as short as possible, because otherwise we will not have—any that we do not finish today, we will bring back sometime after Christmas.

I will yield to the distinguished Senator from South Carolina, who may wish to make some comments.

Senator THURMOND. Thank you, Mr. Chairman.

I think the quicker we can do these introductions, it can be shortened if the entire statements can go in the record. We are very pleased to have these distinguished Senators with us, Senator Heinz, Senator Danforth, Senator Bond, with us today, and Congressman Conte, we are very pleased to have him, a Member of Congress.

Senator LEAHY. He may consider that a demotion. There are very few of us, Senator, who begin to wield the power that the Congressman from Massachusetts wields.

Senator Heinz?

STATEMENT OF THE HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Mr. Chairman, I thank you for holding these hearings so promptly. It is a pleasure to join with my colleague, Senator Specter, to introduce to you and the committee Judge Robert Gawthrop, the President's nominee to fill one of the two remaining vacancies on the U.S. District Court for the Eastern District of Pennsylvania.

Bob Gawthrop has served on the Chester County Court of Common Pleas since 1977, and just 2 weeks ago today he was overwhelmingly reelected to serve a second 10-year term on that court.

Judge Gawthrop began his tenure on the court by serving as the sole Family and Juvenile Court Judge, as well as judge of the Orphans Court Division. His jurisdiction encompassed such areas of the law as custody and support, juvenile dependency, and delinquency, and trust and estates. In 1980 he elected to move to general common pleas jurisdiction where he heard all types of civil and criminal cases, from contract disputes and medical malpractice, to driving under the influence and murder one.

In addition to his responsibilities on the Court of Common Pleas, Judge Gawthrop has also been the supervising judge of both of Chester County's Special Investigating Grand Juries, as well as serving as a faculty member of the Pennsylvania College of the Judiciary, an institute that provides training for new and experienced trial judges in the 60 divisions of the Court of Common Pleas.

Prior to his service in the Pennsylvania Judiciary, Bob Gawthrop served for 7 years as an Assistant District Attorney in Chester County, and upon his graduation from Dickinson Law School, he practiced general law for 8 years; and following his graduation from Amherst, he served in the U.S. Army and was honorably discharged as a first lieutenant.

Mr. Chairman, I particularly want to note that Judge Gawthrop was selected through the bipartisan merit selection judicial nominating process that Senator Specter and I, and before that, Senator Schweiker and I established, to recommend outstanding men and women to us and to the President for appointment to the judiciary.

In addition to having been recommended by our commission, Judge Gawthrop has been rated by the American Bar Association as being well-qualified to serve on the U.S. District Court for the Eastern District.

Mr. Chairman, I would like to point out that Judge Gawthrop has many talents, one of which is theatrical.

Senator LEAHY. Gilbert and Sullivan.

Senator HEINZ. He is into Gilbert and Sullivan, my lord, and this past Memorial Day he sang with not the right wing or the left wing, but the theater wing of Philadelphia Bar Association. He apparently is a pretty good actor as well.

I am reminded of a quotation from *Iolanthe* that I am sure Judge Gawthrop would not attempt to apply to himself, but we might apply to people who come before this committee. I think it is a good standard of the law. I quote: "The Law is the true embodiment of everything that is excellent. It has no kind of fault or flaw, and I, my Lords, embody the Law."

Obviously, there is a little irony intended in that, Mr. Chairman, but those of us who bring nominees before this committee are pleased to be able to present people who do believe that the law is something very special and that they are committed to it. I think in Judge Gawthrop, who we have submitted to you, is a nominee of that kind of commitment.

I appreciate the opportunity to be here and to present to the committee, together with Senator Specter, Judge Robert Gawthrop.

Thank you.

Senator LEAHY. Thank you. I appreciate what you have said about a man who feels so strongly about the law. In fact, that is one of the reasons why I took on this assignment to chair these various confirmation hearings, because of my own concern for the law. I can think of no responsibility that I could carry out that would be that are more important throughout this Congress, and I can think of few responsibilities each one of us could have that are more important than who we might recommend to the President to be Federal judges in our own States. I know you took that matter seriously, as did Senator Specter.

I will now yield to Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

I would supplement what Senator Heinz has said in just a couple of very brief remarks.

First, I thank the chairman of the committee for moving ahead with this confirmation hearing, with the view to having it processed through the Senate before Christmas. We need Judge Gawthrop on the U.S. District Court for the Eastern District of Pennsylvania.

As to Judge Gawthrop's qualifications, I have known him personally for more than a decade. He brings to the bench an unusual combination of youth and experience. He is 44 years old, which is a great age to come to the Federal court. He has had extensive expe-

rience as Assistant District Attorney and as a State trial judge, and I think he is eminently well suited to render years of distinguished service to the Federal judiciary. Thank you, Mr. Chairman.

Senator LEAHY. Thank you very much. Judge Gawthrop, do you have members of your family here?

Judge GAWTHROP. I do, Mr. Chairman.

Senator LEAHY. Would you please introduce them?

Judge GAWTHROP. It would be my pleasure.

Let me lead off with an appropriate one to start with, my mother, Elizabeth Gawthrop; my father, Robert S. Gawthrop, Jr., Esq.; next to him is my niece, Maggie Klarberg, from the State of New York; next to her is her brother, my nephew, Collis Klarberg, he is the one with the hair——

Senator LEAHY. I am envious, I might say. [Laughter.]

Judge GAWTHROP. Next to him is Christopher Riely. Christopher is my nephew from Massachusetts. Christopher and I celebrated the Bicentennial of the Constitution this summer by climbing Mount Madison together in the State next to your own, sir.

Then we have Beth Riely, my sister back there; and next to her is Andrew Riely, her son, my nephew; and Emily Klarberg, my other sister, also from Mamaroneck, and that does it.

Senator LEAHY. That is very nice. I am sure your parents feel a great sense of pride in being here. I know the first time I was sworn in in the Senate, how much I enjoyed looking up at my mother and father sitting up in the gallery and how much it meant to me, and I could well imagine how you must feel here today.

Thank you, Judge, and if you could step down for a moment, I want to go on with the other introductions here. I know that Senator Danforth has one to introduce, and if you would do that. I understand that you want to introduce Judge Whipple here today.

STATEMENT OF HON. JOHN C. DANFORTH, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator DANFORTH. Thank you very much, Mr. Chairman. I hope I do better with this introduction than the last time I appeared up here before the Judiciary Committee with a nominee. That was Judge Bork. [Laughter.]

Senator LEAHY. It took me a moment. Your success rate is outstanding, so none of us even remember if you have a little failure here or there. Others may, but we do not.

Senator DANFORTH. Thank you very much, Mr. Chairman.

Mr. Chairman, I am honored to present to the committee for confirmation for the U.S. District Court for the Western District of Missouri, Judge H. Dean Whipple.

Judge Whipple is and has been for some years a circuit judge in our State. Prior to serving as a circuit judge, he was prosecuting attorney for Laclede County, Missouri. He has very extensive courtroom experience, as you can see from his résumé, trying a variety of civil and criminal cases, both as a judge, as a prosecutor and as a prosecuting attorney, and, for that matter, also as a practicing lawyer before that time.

Judge Whipple, among other things, is a marathon runner. He has run three times in the Boston Marathon, and he is in the pink of condition.

I want to describe to the committee the process that we use in Missouri for sending to the President the names of potential nominees for the U.S. district court. Senator Bond and I create, together with the Missouri Bar and law school deans, a committee that consists of seven members. In this case, the committee was chaired by the former State Supreme Court Chief Justice, James A. Finch. It was a very illustrious committee of members of the bar and lay people.

With the help of the Missouri Bar, the existence of the vacancy was widely publicized. I believe that the bar sent post cards to every lawyer residing in the Western District of Missouri. As a result of that publication of the vacancy, 37 applications were received by the committee. The committee in turn interviewed applicants, I believe a couple dozen or so applicants were actually interviewed, and the committee in turn sent three names to Senator Bond and me. From those three names, we in turn selected one, Judge Whipple, and sent his name to the President.

I would say, Mr. Chairman, that since President Reagan has been in office, I have had the privilege of convening three different committees for the purpose of suggesting nominees for the court, and Judge Whipple has made all three panels that have been sent to me. This indicates, I think, the fact that he has been screened and rescreened and rescreened again for this job.

One thing that impresses me about Judge Whipple is to talk to lawyers who have practiced before him in the circuit court—and I have talked with a number of them and I have read letters from a number more. They have the greatest respect for Judge Whipple. His reputation is that he is an extraordinarily hard-working person, he is willing to put in incredible hours in the trying of cases and the reviewing of documents. He has a reputation for being extraordinarily even in his disposition, very fair to lawyers and to parties who appear before him.

Also, in addition to those qualities, he has the reputation for being a very decisive judge. I think those of us who have practiced law in any court, and particularly in the Federal courts, realize that one thing we want from a trial judge is a decision, whether it is right or wrong, get on with it, move the process along, and Judge Whipple has a reputation for being able to make up his mind.

I am absolutely convinced, having known him for a considerable period of time, that he is a person who is totally committed to the concept of equal justice under the law, that he is a person who is totally committed to respecting the liberties of people who appear in his court.

So, Mr. Chairman and members of the committee, it is truly a great honor for me to present to the Judiciary Committee H. Dean Whipple, for U.S. District Court for the Western District of Missouri.

Thank you.

Senator LEAHY. Thank you very much.

Do you have members of your family here, Judge Whipple?

Judge WHIPPLE. No, Mr. Chairman, I do not. My wife is a kindergarten teacher. I was out of town when I got the call to be here and we got our signals crossed and she did not have enough time to get a substitute teacher, but she and the kindergartners are here with me in spirit.

Thank you.

Senator LEAHY. I bet they are. Thank you very much.

Thank you very much, Senator Danforth.

Senator DANFORTH. Thank you.

Senator LEAHY. We have my good friend and neighbor, Congressman Silvio Conte, the leader of the New England delegation, here with Mr. Harrington. Please step forward. It is very good to see you over here, Silvio.

STATEMENT OF HON. SILVIO O. CONTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. CONTE. Thank you, Senator. It is good to be here in your company and to appear on this side of the table. It is also a pleasure to see my good friend, Strom Thurmond. I spend a lot of time with Strom down at the White House in Republican leadership meetings. Every time those meetings go a little astray, Strom always brings them back to the focal point, and I have really gotten to know him well and admire him and his family.

My good friend, Senator Specter, I see a lot in the appropriations process. I was just telling him that I had wanted an economic summit, but that if we were assigned the responsibility to write the Constitution, that group at the summit right now would never get beyond the Preamble. We have only got two more days, but——

Senator LEAHY. I look forward to seeing you every night on television, Silvio, because I know you sum it up so well. [Laughter]

Mr. CONTE. We have had some fun over there.

Thank you very much for providing me with the opportunity to appear before the committee this morning. The purpose of my testimony is to introduce to the committee and offer my support and endorsement of Edward F. Harrington, who has been nominated by the President to serve as a Federal district judge in Massachusetts.

It is my pleasure to urge this committee to give favorable consideration to this nomination, of course ultimately to recommend the full Senate's approval. Ted Harrington has had a distinguished career of legal service in both the private and public sectors, and I am sure that he will be an outstanding Federal judge.

After an outstanding academic performance at the College of the Holy Cross, in Worcester, Ted received his law degree from Boston College Law School, my alma mater, where he was a member of the Law Review. After a clerkship with the Chief Justice of the Massachusetts Superior Court and a brief stint in private practice, Ted served as a special trial attorney with the Criminal Division of the U.S. Department of Justice, and after 4 years in that position, Ted was appointed to be an assistant U.S. attorney for Massachusetts, where he was involved in the trial and appeal of Federal criminal and civil cases in the district of Massachusetts.

Ted Harrington's other public positions have included service as Attorney-in-Charge for the Justice Department's Organized Crime

Strike Force for the New England Area, and as U.S. attorney for Massachusetts until November 1981. Since that time, Ted has been in the private practice of law, with emphasis on litigation matters.

Mr. Chairman, Ted Harrington has had a wealth of experience involving the prosecution of civil and criminal matters, representing both the United States and private litigants. It would be difficult to imagine better preparation for service as a Federal district judge.

I recommend this committee's favorable consideration of Ted's nomination for this position, and I am pleased to introduce to the committee a native of Massachusetts and a good friend of mine, Ted Harrington.

Thank you.

Senator LEAHY. Thank you very much.

Mr. Harrington, do you have any members of your family here?

Mr. HARRINGTON. I have, Mr. Chairman, my wife, Ellen.

Senator LEAHY. It is good to see you here, Ms. Harrington.

Mr. HARRINGTON. My sister-in-law, Ann Garrahan.

Senator LEAHY. How do you do?

Mr. HARRINGTON. And my brother-in-law and law partner, John Garrahan, of Framingham, Massachusetts.

Senator LEAHY. It is nice to see you. It is good to have you here.

I know you have a million other things to do, Silvio, and we appreciate you being with us here today, too.

Mr. CONTE. Thank you, Mr. Chairman.

Senator LEAHY. Thank you, Mr. Harrington.

The distinguished ranking member of this committee I know has Mr. Rose here. Did you want to take time to introduce him at this point, Strom, or what would be your pleasure?

Senator THURMOND. I guess so.

Senator LEAHY. Maybe this would be a good time to introduce him.

Senator THURMOND. Mr. Chairman, it gives me great pleasure to introduce to the committee William S. Rose, President Reagan's nominee to be Assistant Attorney General for the Tax Division of the Department of Justice.

Mr. Rose was born in Columbia, SC. In 1970, he graduated from the University of the South, with a bachelor of arts degree in English. Mr. Rose then entered the University of South Carolina School of Law, and in 1973 received his juris doctorate degree.

From 1974 to 1976, he attended Georgetown University Law Center, where he received his LLM in taxation. During the period from 1973 to 1976, Mr. Rose served as an attorney with the Office of Chief Counsel, Tax Court Litigation Division, Internal Revenue Service.

In 1977, he joined the Cincinnati law firm of Foster & Jacobs, and practiced there until 1981. In 1981, Mr. Rose returned to South Carolina and joined the McNair Law Firm, in Hilton Head Island, SC.

Mr. Rose has had considerable experience in the area of tax law. While he was with the Office of Chief Counsel for the IRS, he was responsible for determining legal positions to be taken in such areas as revenue rulings, revenue procedures, and tax litigation.

In addition, as a practicing attorney, he was largely involved in Federal income tax planning litigation for individuals as well as real estate development and general corporate business practice.

I believe this experience will be most valuable to him in the position to which he has been nominated. He is a man of ability, intelligence, integrity and independence. Mr. Rose is a dedicated and trustworthy individual, whose commitment to law is highly regarded, and his outstanding record speaks for itself.

He has experience and knowledge to serve well as Assistant Attorney General for the Tax Division. It was with considerable pride that I recommended Mr. Rose to President Reagan for this very important position, and it is with an equal amount of pride that I present him to the committee today. I feel that he will fulfill the trust imposed in him and that the Justice Department and the administration and the country will be well-served by his confirmation.

Thank you very much.

Senator LEAHY. Thank you very much.

Mr. Rose, do you have any members of your family here?

Mr. ROSE. Yes, Mr. Chairman, my wife, Frances Rose.

Senator LEAHY. Ms. Rose, it is nice to have you here, ma'am. Thank you very much.

I know Senator Bond is here with Judge Whipple. Did you want to say a word to us?

Judge, feel free to come on back up here. We are going to keep the chairs warm here for the rest of the day.

STATEMENT OF HON. CHRISTOPHER S. BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator BOND. I apologize, due to the scheduling mix-up I did not realize my good friend, Judge Whipple, was going to be before the committee at this point. I know that my distinguished senior colleague, Senator Danforth, has already described at great length the process by which we obtained from a distinguished panel the recommendations of Judge Whipple and two other very fine candidates for this position. We recommended him, based not only on their recommendation, but personally. I have extensive knowledge of and friendship with Dean Whipple, going back many years.

You will see from his biography before you that he has served 4½ years as prosecuting attorney. He has also been in private practice for a similar length of time, in which he was a very active trial attorney.

I think it is significant that his fellow members of the bar recognized his talents. He has served for about 12 years on the Board of Governors of the Missouri Bar. During that time, he has been very active in continuing legal education work.

In addition, knowing Dean Whipple very well, I can tell you that he is highly regarded in his community and church, where he has served in a wide variety of functions, and he has the highest respect of the community as well as the members of the bar that have had the opportunity to appear before him.

Mr. Chairman, it is with great pleasure that I give the highest recommendation to Dean Whipple.

Thank you very much.

Senator LEAHY. Judge Whipple, I am sure you realize you come here with recommendations of two of the most respected members of the U.S. Senate.

Judge WHIPPLE. Yes, sir, Mr. Chairman.

Senator THURMOND. I concur in what the Chairman has said. We are delighted to have you with us, Senator.

Senator BOND. Thank you, Senator.

Senator LEAHY. Strom and I always concur.

Judge Gawthrop, why do you not come back up here, please. Will you stand and raise your hand. Do you solemnly swear that the testimony you will give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge GAWTHROP. I do.

TESTIMONY OF HON. ROBERT S. GAWTHROP III, OF PENNSYLVANIA, A NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Senator LEAHY. Judge Gawthrop, did you have any opening statement or do you just want to plunge into the questions?

Judge GAWTHROP. Mr. Chairman, I just want to tell you what a genuine privilege and honor it is to be before this august body, and in particular before this distinguished committee.

In addition to that, I certainly thank you, sir, and all of your colleagues, for the alacrity with which my particular nomination has moved. I deeply appreciate it.

Senator LEAHY. Thank you very much.

Judge, the new sentencing guidelines of the Federal courts went into effect just a couple of weeks ago, and as a State court judge you have had some experience with the Pennsylvania sentencing guidelines. You list on your questionnaire response one case in which your sentencing decision "was reversed for not setting forth with sufficient specificity why [you] had exceeded the discretionary sentencing guideline." I would like you to tell me some of your experience in sentencing under the guideline system. Have judges in Pennsylvania retained sufficient discretion under the guidelines to tailor each sentence to the specific facts of the case and the specific characteristics of the offender?

What I am really asking is, Do you anticipate the Federal sentencing guidelines will allow you to "make the punishment fit the crime?"

Judge GAWTHROP. I believe——

Senator LEAHY. You probably recognize the quotation.

Judge GAWTHROP. Yes, I enjoy the Gilbertian.

Mr. Chairman, I have found that under the sentencing guidelines it does not create a great problem for trial judges working with it. The principal problem, frankly, has been paperwork. There is a lot more paperwork engendered by the filling out of the forms for the Sentencing Commission.

Often, the guidelines themselves set forth limits of the sentence, the minimum and maximum, which almost always in my experience, I was working within that limitation anyway, for example,

whether it was going to be zero months or 12 months in prison, is a question of where within that range the sentence will be.

I think statewide in Pennsylvania, it has had an exemplary result in that it has induced certain judges who perhaps were on the nether end of the sentencing scale to bring their sentences within what was determined to be the presumptive norm within our Commonwealth, thereby visiting upon defendants a much closer approximation of equal justice under law.

Senator LEAHY. It is interesting, the fact that you bring up the paperwork. That is one of the things that I am concerned about with the new guidelines on Federal judges, and I suspect that this committee will visit that question after we have had a few months or a year of experience on it, because with court dockets expanding and the workload also expanding, that is one of the things that we want to keep in check.

I was very pleased with an article you submitted to the committee when you wrote the bar association newsletter in your home county, about the Bicentennial. Let me read for those here one part from it.

You said, "When a lawyer"—you are speaking of the Bill of Rights—you said, "When a lawyer, for example, is so audacious as to cite an item in the Bill of Rights in order to protect his client, the constitutional right is reduced to a 'legal technicality,' and the lawyer reviled, as, at best, an obstructionist. I recently had a citizen express disgust to me that a criminal defendant had actually insisted on going to trial, rather than pleading guilty, and that he had a free lawyer, to boot. My efforts to explain the presumption of innocence and the meaning of *Gideon* v. *Wainwright* . . . were less than fully successful."

I am glad you wrote that article, and I would love to see articles like that all over the country. I served both as a defense attorney in my early years and practiced for 8½ years as a prosecutor, at the same time Senator Specter was, so I have seen it from both sides. I think *Gideon* v. *Wainwright,* and I felt this as a prosecutor, is one of the greatest strides this country has made in its constitutional jurisprudence.

Sometimes the public is led to believe that those constitutional protections in the fourth and fifth amendments are mere technicalities. Unfortunately, some people in our government helped perpetuate that misconception. I am glad to see you speak out and point out that there is a very real reason why they are there.

On a related topic, in a recent opinion which you furnished to the committee, *Pennsylvania Department of Transportation* v. *MacDonald,* you criticized "the well-meaning invention of *per se* rules proclaimed for the worthy purpose of furthering and quickening the quest for justice, but later, in the light of reality, repealed or greatly limited." And, in your list of some of these *per se* rules you include the rules announced in *Miranda* v. *Arizona,* and the Supreme Court precedents on evaluating affidavits for search warrants.

And you conclude as follows: "The wholesale experiment in *per se* rules, as worthy as were the motives behind their creation, has been something of a wholesale failure, once those rules, essentially legal fictions, were subject to the harsh light of the real world."

I agree that the *per se* rules cannot cover every real life situation the court may confront, but when they do define the limits of permissible police activities, as *Miranda* did, I think they have an advantage of at least telling the police specifying what they may or may not do in a given situation.

What would be the practical alternative to such rules, or are there any?

Judge GAWTHROP. I think the practical alternative, Mr. Chairman, is to allow the judges themselves to assess the factors which bear upon whether a confession, for example, should be suppressed and allow the judges to use their good hard judgment in determining whether it should be admitted.

For example, one of the per se rules in Pennsylvania recently abrogated is the case of *Commonwealth* v. *Davenport,* which held that if a defendant is not arraigned within 6 hours of his arrest, any confession taken in the interim is ultimately suppressed. The effect of this is if someone were to be brought into a station house and 2 minutes later, literally, quite voluntarily confessed, after a full panoply of Miranda warnings, yet they did not get him in front of the district justice until 6 hours and 4 minutes. For example, in one case, an arson-murder case, the Supreme Court threw out on that basis occurred, in my view the rigid adherence to that per se rule entails an overly blinding one to a just result and the diversion from the jury of truthful proper evidence that they should be permitted to consider. It is in that context that I was referring to it, and the *Davenport* case came in a well meaning way, in which the police in Philadelphia had been, I think, abusive in keeping people in the so-called "round house," the police station, interrogating them at great lengths.

In order to prohibit this, the *Davenport* rule came about and then the injustices resulting from *Davenport* were observed and then that rule was attenuated with the more recent decisions.

Senator LEAHY. That rule was what?

Judge GAWTHROP. *Commonwealth* v. *Davenport.*

Senator LEAHY. No, no, but you said something happened to the rule in more recent decisions?

Judge GAWTHROP. It was attenuated, it was——

Senator LEAHY. I just did not hear the word.

Judge GAWTHROP. It was changed somewhat.

Senator LEAHY. When the Supreme Court, the U.S. Supreme Court laid down certain per se rules, and I am thinking something like *Miranda,* do you feel that, as a Federal district judge, you are bound by those kind of rules, well-established——

Judge GAWTHROP. Most certainly, Mr. Chairman.

Senator LEAHY. I do not want to go into any part of the confidential material you made available to the committee, but on one issue, only because it is referenced in the public questionnaire, I would like your response on the record. Are you satisfied from a medical point of view that you would not have any problem in serving as a Federal district judge, and do your physicians agree?

Judge GAWTHROP. I am absolutely satisfied that I am physically up to the job, sir.

Senator LEAHY. Thank you.

You have referred to the various clubs you belong to and why their membership requirements are not discriminatory. You mentioned that one organization, the Quarry Club, which has no formal discriminatory policy, has no blacks as members. Are there any that have applied, that you are aware of?

Judge GAWTHROP. I assume—I do not know that there are any that I have seen swimming out there. It is just a swimming hole south of West Chester. I live in town and I go down there to try to stay aerobically fit, or try to be, and I have not seen any blacks there. I know of absolutely nothing in their charter or whatever that precludes blacks from being admitted. I do not know of any that are in it.

Senator LEAHY. Senator Thurmond?

Senator THURMOND. Thank you very much.

Judge, I want to congratulate you on your appointment by the President——

Judge GAWTHROP. Thank you, Senator Thurmond.

Senator THURMOND [continuing]. And on having the high endorsement here of both of your able Senators. Senator Specter here is an outstanding member of this committee, and Senator Heinz is also highly respected, and I am sure that goes a long ways with you.

I just have two questions. How does a responsible judge go about the process of interpreting such seemingly open-minded constitutional provisions as the Due Process or Equal Protection Clauses?

Judge GAWTHROP. Well, due process in my view basically boils down to being a fair trial or a fair proceeding. I am assiduous, for example, in making sure that notice is given to opposing counsel on so seemingly mundane a matter as a lawyer coming in with a rule to show cause, together with a stay order. The effect of a stay order can, of course, be draconian and I am always careful to insure that the other side has an opportunity to be heard. In a court of law, it means that a case is tried fairly, that there is competent—in a criminal case, for example, there is competent constitutionally sufficient, under the sixth amendment, defense of the case and that there is not prosecutorial overreaching or violations of *Brady* v. *Maryland,* for example, to give but a few examples.

With respect to equal protection, I recently had a case in which the question was obliquely raised and I did not approach it directly, but it was a question of whether in work release in Chester County, a partial confinement situation, there was not a provision, there was no such provision for women and I, in a footnote to my opinion, mentioned that, although it was not directly confronted in the case, it could very well violate both the Equal Protection Clause and indeed the Equal Rights Amendment of the Pennsylvania Constitution.

Senator THURMOND. Judge, article III, section 1 of the Constitution invests in the Congress plenary power to ordain and establish such inferior Federal courts as it sees fit. In other words, Congress can do it by statute. To what extent, as a direct function of that power, is Congress equally empowered to limit the jurisdiction of lower Federal courts over various classes of cases and controversies?

Judge GAWTHROP. In my view, Senator, the Congress has considerable power in that regard. Indeed, we have heard discussion of diversity jurisdiction being eliminated, and as I view the Constitution and the interpretive case law, Congress has plenary right to terminate that area of jurisdiction, to cite but one example. It is within their authority, their aegis.

Senator THURMOND. I do not have any other questions. I hope you have a fine career in the bench and I wish you well.

Judge GAWTHROP. Thank you very much, Senator Thurmond.

Senator LEAHY. Senator Specter?

Senator SPECTER. Thank you very much, Mr. Chairman.

As previously indicated, I know Judge Gawthrop and need not ask him any questions. I would just make a comment. When Judge Gawthrop refers to the "round house," that is well known in the Philadelphia area. The police department has a circular building, so it is called the "round house." When there is a complaint made about a 6-hour provision for people detained without being questioned, that is a remarkable advance. Prior to the time that the magisterial system in Philadelphia was changed, they used to be held for much longer periods of time. Then we had a minor judicial official available 24 hours a day and they were not processed as soon as they could have been, and I think what Judge Gawthrop has referred to as an improvement down the line—and I think he is correct—there has to be some flexibility from the 6-hour arraignment.

When he talks about *Gideon* v. *Wainwright,* it is hard to believe I was a young assistant DA when *Gideon* came down in 1963, and it is hard to remember a time that people came into the criminal courts without defense lawyers. I recall shortly after coming to the bar being a voluntary defender and the people I represented had a lawyer, but barely, and that too often is the case.

So, we have made considerable progress, and I think Judge Gawthrop is a product of a new generation very sensitive to the issues of due process and I think will make an outstanding jurist.

Thank you very much.

Judge GAWTHROP. Thank you.

Senator LEAHY. That brings back memories. I was in my last year of law school when *Gideon* came down. I remember it very well.

Judge Gawthrop, your experience has all been in the State courts and the Commonwealth courts. Do you see that as being a hindrance to going to the Federal court? What will you do to get up to speed for the Federal court?

Judge GAWTHROP. As soon as I leave here, Senator, I am going over to the Dolley Madison, I believe it is, Federal Judicial Center and talk with the people there who, I must say, have been tremendously helpful in inviting me to learn the system. I recognize, assuming it goes favorably here, I have some homework ahead of me, I am looking forward to the challenge. I shall be studying assiduously to make the shift to a different framework of procedural and evidentiary rules as well as substantive law.

Senator LEAHY. Thank you very much. Judge Gawthrop, I appreciate you being here. You are free to go. I do not know if any of your—you have swelled the population of Washington, D.C., sub-

96-183 0 - 89 - 22

stantially with nieces, nephews, parents and everybody else. I would strongly advise you to go and take them and do a little sightseeing.

Judge GAWTHROP. I would hate to have a fidgeting nephew. Thank you, Senator.

Senator LEAHY. Judge Whipple, if you could come back before us. Would you raise your hand, please: Do you solemnly swear that the testimony you give shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge WHIPPLE. I do.

Senator LEAHY. For any of those who have just seen us on television and think that these are such hard-hitting hearings, you see all the trouble that Judge Gawthrop just had to go through.

Did you have any opening statement you wanted to make, Judge Whipple, or would you like us to just go to the questions?

Judge WHIPPLE. Mr. Chairman, thank you. The only opening statement——

Senator LEAHY. Excuse me, I want to yield now to Senator Thurmond.

Senator THURMOND. I must go to the White House for a meeting. If you would excuse me, I just have a few questions for each of the other two judges, if you don't mind, I would appreciate it. I have looked into the qualifications of the other two gentlemen and I favor both of them.

Senator LEAHY. How about this guy from South Carolina?

Senator THURMOND. Well, I am talking about judges. Of course, the one from South Carolina speaks for himself. He is well qualified and so I would favor all of these nominees. I know of nothing against them.

I have heard some complaint about Judge Harrington's judicial temperament, and, Judge, I just want to say that in my opinion that is a very important quality, judicial temperament. I see no excuse for a judge—and I have seen it done by Federal judges and State judges—embarrassing a witness or embarrassing lawyers, embarrassing jurors or litigants or any others. I have heard some complaint about that, but I feel it is not serious enough and I am going to vote for you, but I want to caution you about that. A judge has all the power in the world and he does not need to embarrass anybody.

Mr. HARRINGTON. Thank you, Senator.

Senator THURMOND. Thank you very much.

Senator LEAHY. If you could just stand by for a moment, Strom: I have heard you make that admonition for the 10 years I have been on this committee and I do not think it could be made enough. I am so proud that you do that, because I practiced law for a number of years before I came here and you are absolutely right. Judges have to understand that they are the embodiment of the whole court system. It is so easy when you are tired or something to lose your temper and just give one side or the other hell. A judge cannot do that because there is really no response from the counsel across the bench, they are just not in a position to do it. Senator Thurmond's comments are absolutely right.

Any questions that Senator Thurmond has, we will include for the record.

Senator THURMOND. I just have about two questions each.

Senator LEAHY. I should note that no member of this committee has been more a more faithful participant in the judicial nomination hearings this year than Senator Thurmond has been.

Senator THURMOND. Thank you very much.

Again, Mr. Chairman, I want to say that I have looked at the records of all three of the judges and also the gentlemen to the Justice Department in charge of the Tax Division, Mr. Rose, and I think they are all qualified and I hope we can approve them and get them right out and act on them before Christmas, and with your expertise I am sure we can get it done.

Senator LEAHY. One nice thing about having Mr. Rose here is we get a chance to hear Senator Thurmond speaking Latin with a South Carolinian accent, and it is for those of us who grew up in schools where we had to learn Latin in grade school, high school and college, as I did, it was a remarkable experience. The Jesuits have never heard the like.

TESTIMONY OF HON. DEAN WHIPPLE, OF MISSOURI, A NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI

Senator LEAHY. Judge Whipple, let me just follow up with a question very similar to what I ended up with Judge Gawthrop: Your experience, both in private practice and on the bench, has been almost entirely State law matters. Now, obviously you do not feel that is an impediment or you would not have accepted this appointment, but it does require some steps on your part. What will you do to familiarize yourself with the Federal system?

Judge WHIPPLE. Yes, Mr. Chairman. First of all, I have attended the orientation, the video seminar that the National Judicial Center invites newly appointed judges, in Richmond, Virginia, 2 weeks ago, and that was very helpful. That was a ground work from which I can call upon. They gave us a good review of the Rules of Criminal Procedure, Federal Rules of Civil Procedure, and Federal Rules of Evidence. Yes, I have started the studying process. The unique difference in the Federal system from how we handle cases in the State of Missouri, of course, is we have rules that allows an attorney to get a case to trial within 6 to 8 months, following our rules. We do not have scheduling conferences and take charge of the case immediately. That is the main thing I have to learn to do and pick up that system, but I am looking forward to it and I have already started the learning process.

Senator LEAHY. You feel that program in Richmond is a pretty good program.

Judge WHIPPLE. Absolutely, yes, sir. The video—when I first got the invitation, I was a little—it did not sound too exciting, a videotape seminar, but it was very well done, the tapes are well done and then Judge Hoffman, Senior Judge Hoffman was the moderator, who took time after each tape to lead the discussion and give us plenty of time for questions. The only problem with it, it was not long enough, we could have had another day or two very easily. I hope we do have sometime.

Senator LEAHY. I think you will find your fellow members of the bench back in Missouri will also be delighted to have somebody come in and fill the seat.

When you were—you have been both a prosecutor and a criminal defense attorney, like Senator Specter, who just left, and myself, and you have seen it from both sides. Talk to me a little bit about the importance of the exclusionary rule. You have seen it both as a defense attorney and a prosecuting attorney. What are your views?

Judge WHIPPLE. Basically, my views are that many times it results in evidence that was obtained by technical error to be excluded when it should not have been, when it did support the trial of the case, and when it is adequately established that it was an honest error, honest oversight by law enforcement, I think the evidence ought to be left in, but there needs to be that prerequisite to make that finding independent of and out of the hearing of the jury, of course.

Senator LEAHY. What about—let us take something that is even more specific, a per se rule like the Miranda ruling, how do you feel about that?

Judge WHIPPLE. The Miranda rule——

Senator LEAHY. Or warning.

Senator WHIPPLE [continuing]. Or the Miranda warning works fine and the system has adapted to it, every law enforcement officer knows it and knows to abide by it, and there is no reason why they should not be able to comply with it.

Now, the biggest area we see or that I see, coming from my court, is where the defendant—many times, when you arrest defendants, they are intoxicated or under the influence of drugs and they blurt out things, blurt out statements, incriminating statements before the warning can be given, and when that happens I think it should be admissible.

Other than that, the Miranda warning, there is nothing wrong with it being in place as it is, as it is now being applied, because it has been around long enough that everyone can operate under it.

Senator LEAHY. In your questionnaire, you said you were instrumental in setting up the statewide Public Defender Commission in Missouri. What was your involvement in that, sir?

Judge WHIPPLE. The board of governors that I serve on is the governing body of the attorneys in the State of Missouri, and of course all legislation that is supported and sponsored by the Missouri Bar comes through that organization. We have subcommittees—of course, in this case it was the Criminal Law Subcommittee that did the initial drafting. We of the board of governors, of course, we hashed it over at several meetings and put together the form of the bill that was then submitted to the legislature. Now, admittedly there were some changes in it from the original form, but I was in the body that did the drafting of the bill.

Senator LEAHY. The reason I asked about your involvement in it, a year after the Commission was set up, you were called upon to decide a case brought by the Public Defender Commission concerning the absence of a public defender office in the 31st Judicial Circuit in Missouri. Did you consider recusing yourself in that case?

Judge WHIPPLE. No, I did not, because the bill as we drafted it, once the bill was drafted, that was the last personal contact I had

with the passage of the bill and the provision concerning the State's responsibility to pay the expenses of the local office came up under what we call our Hancock amendment. Now, that is like I believe proposition 13 in the State of California, which limited the power of—well, the State government could not impose new expenses, assess new expenses on county or local government, and so it was a challenge under the Hancock amendment, not on the public defender bill itself.

Greene County said we do not have to pay because that is another fee and expense that is being imposed by the State which the Hancock-Proposition 13 type amendment says you should not be permitted to do, and so, no, I had no problems with that.

Senator LEAHY. Would you tell us about the *Stephen Carver* case?

Judge WHIPPLE. I am sorry, the name, please?

Senator LEAHY. The *Stephen Carver* case. This goes back to 1976. You accepted a guilty plea from Stephen Carver. You are familiar with the case?

Judge WHIPPLE. Yes. He entered a plea of guilty to—I believe that is a case where he entered a plea of guilty to a homicide, a murder, and——

Senator LEAHY. The question was why did you not recuse yourself.

Judge WHIPPLE. He pled guilty, he was sentenced, I sentenced him, it was a negotiated plea, as I recall it, he was confined to the Missouri Department of Corrections, and then he filed a post-conviction relief application, which our shorthand language is 27.26 rule, that is the—it is a civil procedure rule wherein they can challenge a prior conviction or a plea of guilty and allege rights that were not known to them or were not available to them or that they failed to raise at the time of trial or on direct appeal—of course, there is no direct appeal from a plea of guilty.

He claimed, as I recall, that he was inadequately represented by counsel. He wanted to withdraw his plea of guilty. The State of Missouri, the prosecuting attorney agreed to that, he said that is fine with me, I want to try him anyway. So, everyone was in agreement to let him withdraw his plea of guilty previously entered and set it aside and set it for trial, and that is what I attempted to do, and then the State wanted to recharge, refile on him for first degree murder. I believe he plead to second degree.

The defense then raised the question to the Missouri Supreme Court that they could not charge him with a higher offense than he originally plead guilty to. The Supreme Court of Missouri took the easy way out and said, well, Judge Whipple should not have allowed him to set aside his plea of guilty and reinstate his plea of not guilty, he should have disqualified himself, and that is how that came about. It was agreed to originally by everyone that was there, and then the fight came over how to retry him, so the Supreme Court said I should have stepped aside and they nullified everything I did, ordering his plea of not guilty to be set aside and let his conviction stand and I believe he is still in the penitentiary.

Senator LEAHY. Thank you. Thank you very much, Judge Whipple. We will submit a question for the record for you from Senator Thurmond.

I thank you very much for being here today.

Judge WHIPPLE. Thank you, Mr. Chairman.

[The question and answer referred to follows:]

QUESTIONS FROM SENATOR THURMOND FOR JUDGE DEAN WHIPPLE, TO BE UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI

Q: Judge Whipple, one of the characteristics of judicial activism is said to include a tendency by the judiciary to impose itself upon other institutions in the manner of an adminsitrator with continuing oversight responsibilities. Would you give the committee your views on this criticism?

A: The federal judiciary should handle cases which address specific issues, try these cases and bring them to conclusion. The judiciary should not impose itself on other institutions as a supervisor because this is an encroachment on the executive or legislative branches of government.

Q: Another criticism of judicial activism is a tendency by the judiciary toward problem-solving rather than grievance-resolution. Do you feel that this criticism is valid?

A: Yes. Federal courts have the limited jurisdiction given to them by the Constitution and Congress. The federal courts should handle cases which arise out of actual controversies between real parties in interest. Federal courts encroach on the power given to Congress when they attempt to solve problems.

Dean Whipple

Dean Whipple
November 17, 1987

Senator LEAHY. I now call Mr. Harrington.

Would you please raise your right hand: Do you solemnly swear that the testimony you give in this matter shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HARRINGTON. I do.

TESTIMONY OF EDWARD F. HARRINGTON, OF MASSACHUSETTS, A NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF MASSACHUSETTS

Senator LEAHY. Mr. Harrington, I understand—I am back to the history here—that you were a member of that special team of lawyers sent to Mississippi in the summer of 1964 by then Attorney General Robert Kennedy to help protect civil rights workers who were conducting freedom schools throughout the State. Is that correct?

Mr. HARRINGTON. I was, Senator.

Senator LEAHY. Would you tell us what that was like?

Mr. HARRINGTON. Well, it seemed like a different world ago, but in conjunction with the enactment of the 1964 Civil Rights Act, Attorney General Kennedy asked or appointed a band of about ten attorneys under the leadership of Walter Sheridan to go to Mississippi during that summer. I think our function was to be a liaison between local law enforcement and the civil rights volunteers who were conducting freedom schools there.

Part of the program was, at least I remember at the time that President Johnson sent Allen Dulles down there to conduct a fact-finding tour, and some of the attorneys, including myself, met with him. I think the great consequence of that summer in Mississippi was that prior to that time there was no real Federal presence to protect civil rights in the area, and the fact that the ten Justice Department attorneys made their Federal presence felt I think resulted in the Federal Bureau of Investigation for the first time to establish a full-time office in Jackson, Mississippi, and the results over the last two decades has been for the promotion of civil rights of all people.

Senator LEAHY. Was that before, were you down there before or after the murders in Philadelphia, MS?

Mr. HARRINGTON. We were down before, during and after, and I had some limited consultation with the FBI during the course of that investigation and subsequently with Walter Sheridan was involved in at least setting up the grand jury that subsequently years later indicted a sheriff of Mississippi for those murders.

Senator LEAHY. Now, Senator Thurmond mentioned before he left the question of judicial temperament, and the reason we raise this is the question has been raised by other Senators here, and we want to cover this for the record. It says in the background that you have a hot temper, and it is unusual for somebody who is Irish to have a hot temper. I never found it in my family.

In one instance, you reportedly threatened and screamed at a police officer from Framingham when he informed you that he favored proceeding to prosecution against a client of yours for possession of illegal gambling machines. Do you recall the situation?

Mr. HARRINGTON. I do, Mr. Chairman, but I——

Senator LEAHY. Do you want to give your side of the story?

Mr. HARRINGTON. I am glad to have the opportunity. That related to an individual that I represented for the maintenance of videotype machines. Those machines were seized without a search warrant. My partner, who was an expert in civil rights prosecutions or litigation, wrote a letter to the Framingham Police Department, saying that that conduct would subject the police department to a civil rights suit.

On the day on which the police department was seeking a criminal complaint, I engaged, along with my partner, Mr. Donahue, outside the hearing room and attempted to negotiate a settlement. I indicated to the police officer that if you would not go forward with regard to the criminal case, we would not seek a civil suit. It was done in a very lawyer-like manner, the merits of the case were being discussed, and yet this police officer, once the phrase "civil suit for violation of civil rights" was uttered, he indicated that he was treating such a legal discussion as a threat. That is what occurred.

Senator LEAHY. As you described it here, it was in a fairly low-key fashion. Is that the way the voices were during that discussion?

Mr. HARRINGTON. It was even less than that, Mr. Chairman. It was a discussion outside, right in the corridor, and I would say, as I reported back to my law partners, I have never met a more sensitive police officer.

Senator LEAHY. Has temper been a problem for you in the past?

Mr. HARRINGTON. It has not. In fact, until I heard it during these recent weeks and months during the course of this process, I really always thought I was a fairly congenial individual, but over a 27-year career on both sides of the aisle, as a prosecutor and as a criminal defense lawyer, I do not think I have ever really lost my temper. I will admit that on some infrequent occasions I have become testy, but not of any magnitude, and it surprises me that that type of allegation would be made.

Senator LEAHY. This was further raised while we were preparing for this nomination hearing, but was this subject raised when you were considered for a State judgeship?

Mr. HARRINGTON. It was not raised, but I think it was, in my judgment, the reason given for a declination on a State judgeship.

Senator LEAHY. When was that, Mr. Harrington?

Mr. HARRINGTON. In 1983.

Senator LEAHY. Now, in looking over your record, it says you have been involved in a number of the most significant organized crime cases in New England, Raymond Patriarca, Mario Zanino, and others. One case you mentioned in your response to the committee's questionnaire is the recent Angiulo family case. I may be mispronouncing these names. I am half Italian and I still have trouble with half of my relatives' names, and these are not relatives of mine, I hasten to add for the record, and for my mother's sake when I sit here today. [Laughter.]

In the questionnaire, you wrote, "I was U.S. attorney when the so-called Angiulo organized crime investigation was conducted." Was that case actually handled out of your office as U.S. attorney?

Mr. HARRINGTON. It was basically a strike force case, but my involvement in the fight against organized crime goes back to the

early sixties, when I was a member of the Criminal Division, and down through the years. Why that case is very significant is that prior to recent times, especially the enactment of the Organized Crime Control Act of 1970, the only way that government could make a dent against the underworld was the use of the so-called accomplice witness.

In recent years, through the instrument of electronic surveillance, a great impact has been made. In special reference to this case, that a bug was planted in the headquarters of the Boston crime faction, in consultation with me. I worked on it, not on a daily basis but more than a weekly basis, and it was the first time at least in the history of New England law enforcement that an entire organized crime faction was incarcerated and basically rendered impotent.

Senator LEAHY. But it was not handled out of the U.S. Attorneys Office; it was done by the New England Organized Crime——

Mr. HARRINGTON. Organized Crime Strike Force.

Senator LEAHY. In fact, they are physically in a separate location, are they not?

Mr. HARRINGTON. They are in the same building. It was the same——

Senator LEAHY. But not in the same offices?

Mr. HARRINGTON. No, they are not.

Senator LEAHY. And the U.S. attorney is not automatically privy to everything that they do, is that correct?

Mr. HARRINGTON. He does not have to be, but my relationship with the Organized Crime Section was such that on major matters, I was very close to the on-going investigation.

Senator LEAHY. Were you briefed on a regular basis by them on the matters they were covering?

Mr. HARRINGTON. I was.

Senator LEAHY. So, would you say that you were fully cognizant of all of the major organized crime investigations they had under way in at least the geographical area of your jurisdiction?

Mr. HARRINGTON. I was.

Senator LEAHY. Another matter that was raised was in 1981, when you were U.S. attorney, you were instrumental in initiating the prosecution of a notorious individual by the name of Miles Connor who had been accused of involvement in several brutal murders. In connection with that case, you made a statement to the press calling for the investigation of special treatment that had been provided to Mr. Connor by the District Attorney for Norfolk County, and then you were later criticized for disclosing confidential case sensitive information in that public statement. Because that is in the record, would you like to give your side of the story on that?

Mr. HARRINGTON. I will.

Senator LEAHY. Please do.

Mr. HARRINGTON. Miles Connor was a notorious professional criminal who it was alleged at the time to have been involved in the double murder of two young women who had been witnesses to a prior murder. This investigation was conducted jointly by the FBI and the Boston Police Department.

During the course of the investigation, it was determined that Miles Connor was an informant for a district attorney in Massachusetts. As a result of that, since the murders lay in the venue of that district attorney, when the case was ripe for trial, I went to the Attorney General of Massachusetts on behalf of the Federal Bureau of Investigation and requested that a special prosecutor be appointed to try the case. The Attorney General agreed with me, a special prosecutor was appointed, and Miles Connor was convicted in the first trial.

Later, after conviction was achieved, there were allegations at least by the FBI and law enforcement that this close relationship between this district attorney and Miles Connor might have been deleterious to the conduct of such investigation, and I asked the Attorney General to make inquiry into the matter.

Senator LEAHY. He filed a complaint, the Norfolk District Attorney filed a complaint against you with the Justice Department, which was eventually dismissed, is that correct?

Mr. HARRINGTON. He filed it with the Board of Bar Overseers——

Senator LEAHY. Is that what it was?

Mr. HARRINGTON [continuing]. And the Board of Bar Overseers, after inquiring into the matter, made the determination that it would not be considered as a complaint because it was without merit.

Senator LEAHY. And the prosecution of Connor was taken care of by——

Mr. HARRINGTON. By an appointee of the Attorney General, a special prosecutor was appointed and he was successful at the first trial.

Senator LEAHY. Now, you have been a pretty active litigator, you have probably been before more judges than you would like to remember, and during that time you have been before some good ones and some bad ones. I am not asking you now to name any of them, but tell me, what are the qualities that are best in your estimation of a trial judge and then, conversely, what are those things that are worst?

Mr. HARRINGTON. Well, I think there are fundamental qualities that anyone who is going to judge his fellow man has to have, and that is honesty and a sense of fairness. More particularly, I would think a judge has to be patient, courteous, and compassionate. I think those are the major qualities.

Senator LEAHY. Now, on the issue of judicial temperament, the patience, the fairness, and so on, can you point to—what would you point to in your background that would demonstrate that kind of a quality?

Mr. HARRINGTON. Well, first of all, I have never been a judge, I have always been an advocate, but I would——

Senator LEAHY. But you served in a quasi-judicial——

Mr. HARRINGTON. I served as chairman of the Alcoholic Beverages Control Commission back in 1975. Governor Dukakis asked me to take over that agency at a time when it was under intense inquiry by the Globe Spotlight Team for conflict of interest and abuse of process, and in 2 years I straightened out that agency.

I think in 16 years as a prosecutor for the U.S. Department of Justice in various capacities, as a trial attorney, I was an assistant U.S. attorney, I was an attorney in charge of the Department of Justice's Organized Crime Strike Force, and I was the U.S. attorney, I think I have been in almost every facet of the Criminal Division, and I think I was appointed to those jobs because of my good judgment, my enthusiasm for the task, and my ability to get along with people.

Senator LEAHY. Now, you have seen the ABA rating on your appointment, have you not?

Mr. HARRINGTON. I have been notified of it, yes.

Senator LEAHY. A majority found you qualified for the Federal bench, a minority said not qualified. Do you know why the minority reached that opinion?

Mr. HARRINGTON. I can only speculate, and I would speculate that during the course of a career, being involved in many controversial criminal trials, that I suppose my sense of advocacy sometimes caused some antagonism with regard to some lawyers who I am sure opposed my elevation to the bench. That is all I can——

Senator LEAHY. But they have not told you, the ABA has not——

Mr. HARRINGTON. They have not told me at all. They said only that——

Senator LEAHY. Join the group. We do not get much out of them either on those issues.

I understand Senator Thurmond will have questions for the record, too.

[The questions and answers referred to follow:]

QUESTIONS FROM SENATOR THURMOND FOR EDWARD F. HARRINGTON, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MASSACHUSETTS

Q: Mr. Harrington, I consider judicial temperament to be a prerequisite for a federal judge. Would you give me your thoughts on this subject?

A: I believe that judicial temperament is an essential prerequisite for a federal judge. It consists of fairness to the parties and to the witnesses, patience in listening to the testimony of witnesses and arguments of counsel, and unfailing courtesy to all participants in the trial of cases. It also means deciding cases on the basis of precedent and not personal preference.

Q: Are there ever any circumstances under which a judge should attempt to decide a case on some basis other than one where the framers of legislation or constitutional provisions can be detected either through the text of a provision or its surrounding legislative history?

A: No. A federal district judge is bound by his oath to decide the law of a case by determining the intent of the framers of legislation or of constitutional provisions on the basis of the language of the text and legislative history. The prime source for a district judge for determining such intent is the precedential authority of the Supreme Court of the United States and the United States Court of Appeals for the First Circuit and the other circuit courts. Judges are not to impose their own personal views in the interpretive process.

Edward F. Harrington

Edward F. Harrington
November 17, 1987

Senator LEAHY. Did you have anything further you would like to say, Mr. Harrington?

Mr. HARRINGTON. Not at all, except that I am humbled by the opportunity to appear before this committee, in these august chambers. I echo what my fellow nominees have said, that I appreciate granting me this hearing in such an expeditious fashion.

Senator LEAHY. Thank you very much, Mr. Harrington. I appreciate you being here. We will have some questions for the record from Senator Thurmond and anybody else who might have some.

Mr. HARRINGTON. Thank you, Senator.

Senator LEAHY. Thank you very much.

Now, Mr. Rose, from South Carolina, would you please raise your right hand: Do you solemnly swear that the testimony you shall give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ROSE. I do, sir.

TESTIMONY OF WILLIAM S. ROSE, JR., OF SOUTH CAROLINA, A NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, TAX DIVISION, DEPARTMENT OF JUSTICE

Senator LEAHY. You will bear with us, if not withstanding the proclamation of res ipsa loquitur for your appointment from my distinguished senior colleague here, I may have just a couple of questions for you.

You said in your responses to this committee's questionnaire that you have been an officer of several corporations, MBR Corporation, in Rembert, SC, the Adwell Corporation, Jacksonville, IL, the R.A.T. Corporation, Hilton Head, SC, and the Foris Corporation, Hilton Head, SC. What has been your involvement in these businesses, are you as an officer, and what is your financial interest in these corporations?

Mr. ROSE. Mr. Chairman, MBR Corporation owns some land in Kirshaw County, SC, the property is owned in corporate form and my brother, my sister and myself own it in equal shares, and my mother has one share. Basically, it is an inheritance.

Adwell Corporation is a corporation holding land in Illinois and Florida, which one of the beneficiaries is my mother-in-law, and I was asked to serve as a director of that corporation.

The R.A.T. Corporation is a corporation that owns an aircraft with seven other shareholders, and the aircraft is used for personal and business use.

Senator LEAHY. And the Foris Corporation?

Mr. ROSE. The Foris Corporation is a defunct corporation, it was created to export wood to Europe. It never accomplished its mission, it was a shell corporation.

Senator LEAHY. Now, if you are Assistant Attorney General for the Tax Division, do you see any conflicts in any of these corporations?

Mr. ROSE. I have recused myself from any case that may become before the Tax Division in those particular instances and I think the committee has received my recusal list which so indicates.

Senator LEAHY. And you are still a shareholder in the McNair Law Firm, are you?

Mr. ROSE. Yes, sir, I will upon favorable confirmation by this committee, redeem my shares—my only continuing financial interest may be in the profit-sharing plan of the law firm.

Senator LEAHY. So, when something comes up involving the McNair Law Firm, representing a litigant before the Tax Division, I assume you would recuse yourself from any of that?

Mr. ROSE. Absolutely, Mr. Chairman.

Senator LEAHY. Now, the Office of Government Ethics has suggested some amplifications on the memorandum you filed on November 9, outlining the cases in which you should recuse yourself. Will you follow the advice of that office in revising your recusal memorandum?

Mr. ROSE. Absolutely, Mr. Chairman, I willing to do whatever they say.

Senator LEAHY. Good. If you could write a memo, send back to them, and if you could send us a copy, please.

Mr. ROSE. Thank you.

[The memorandum referred to follows:]

U.S. Department of Justice

Tax Division

Office of the Assistant Attorney General

Washington, D.C. 20530

November 30, 1987

MEMORANDUM

TO: Michael C. Durney
Deputy Assistant Attorney General

James B. Mann
Deputy Assistant Attorney General

Michael L. Paup
Acting Deputy Assistant Attorney General

All Section Chiefs
Tax Division

FROM: William S. Rose, Jr.
Acting Assistant Attorney General
Tax Division

SUBJECT: Disqualification (Supersedes Recusal Memorandum of November 9, 1987)

Any case or matter in which the McNair Law Firm (or any partner or associate therein), is involved, and all cases assigned to Judge Truman M. Hobbs, Chief District Court Judge of the Middle District of Alabama, shall not be referred to, or discussed with me, nor shall my name appear on any papers therein. All cases should be referred to the appropriate Deputy Assistant Attorney General.

Until further notice, matters involving the following corporations shall be similarly treated:

PTL Case (conflict)
Bell South Corporation
Berkshire Hathaway, Inc.
FPL Group, Inc.
GTE Electric Co.
Norfolk Southern Corporation
Pillsbury Co.
Southwestern Bell Corporation

Texas Utilities Co.
Weyerhaeuser Co.
Bagley Building Co.
Ocala Golf Limited Partnership
Mt. Pleasant Golf Investors
MBR Corporation
Adwell Corporation
R.A.T. Corporation
Threlkeld Case (appeal from the Tax Court), or any case involving the same issue
Virginia & Charles Hill (Tax Court Case)
Douglas Arizona Housing Bonds
SEI Corporation
Gadsden, Alabama Industrial Dev. Bonds
Parrish, Alabama Industrial Dev. Bonds
South Carolina State Bonds
U.S. Shelter Corporation
Mead Corporation
Merrill Lynch (Commercial Paper)
Commonwealth Edison (Commercial Paper)
ARCO Credit (Commercial Paper)
Dreyfus Government Management Fund
Merrill Lynch Med. Term (Note)
Ford Motor Credit Company (Bond)
Pepsico Cap. Res. Div.
GNMA
Homestead Savings, Burlingame, CA.
American International Group, Inc.
Bank of New York, Inc.
Bausch & Lomb, Inc.
Cordis Corp.
Dunn and Bradstreet Corp.
Farmers Group, Inc.
Govt. Sec. Income FD GNMA M
IBM
Norwest Corporation
PNC Financial
Pfizer, Inc.
Philip Morris Companies, Inc.
RJR Nabisco, Inc.
Raychem Corp.
Shawmut Corp.
Shearson Managed Governments Investment
Damson Institutional Energy Partnership
E. R. Ginn, III, Guaranty

Senator LEAHY. What are some of the major problems or challenges facing the Tax Division? I am sure you must be——

Mr. ROSE. Mr. Chairman——

Senator LEAHY. God love you for being willing to take on that job. I just think it would be one that is sort of opening up a can of worms.

Mr. ROSE. No, sir, it is a privilege for me to work with the men and women of the Tax Division. As you know, I was a member of the Office of Chief Counsel for the Internal Revenue Service approximately 11 years ago, and on that occasion I had a chance to work with some of the men and women of the Tax Division and I know they are the finest tax litigators in the country, and the opportunity to bring some leadership and to manage the good people and make sure that our system of taxation, its integrity remains intact is an honor and a privilege for me to pursue.

Senator LEAHY. There are some superb lawyers there. I did not mean to suggest otherwise. My own practice in the past by choice did not involve tax matters. When I was in private practice and left that to others in the firm, it was simply for the same reason. I let my wife handle all the finances in our office. I find it mind-boggling. Those who watch our Members in Congress vote on budgets probably assume that is the way we all feel, but it is an extraordinary specialized area and I would assume you would not be going there with any delusions about the amount of work that is involved. It is a great deal of work for you. This is not a cushy semi-retirement job, by any means. I think everybody in that division works very, very hard.

Mr. ROSE. Mr. Chairman, I have had lately some complaints from my wife that I have been working too late, as an illustration of the time and effort it takes every day to complete the job.

Senator LEAHY. She should compare notes with my wife.

Mr. ROSE. I am sure.

Senator LEAHY. Tell me, there have been proposals that come up every so often about decentralizing some of the Tax Division's jurisdiction, sending it back down to individual U.S. attorneys. How do you feel about that?

Mr. ROSE. Mr. Chairman, this is a subject matter that you raise that is a very important and crucial one, one that I intend to study very carefully. Some functions, such as search warrants, have been decentralized and sent down to the U.S. attorney level.

There is a continuing debate, if you will, on the subject matter and I intend to look into it with some detail, and if the committee would wish, I would be glad to come up here and, after my findings, share my thoughts.

Senator LEAHY. I would be interested in some of your feelings on it, because I would like to know your goals and priorities in this area, and I will submit some questions to you in that area in writing. Those of us who do not have the expertise in this area, in the tax litigation area, can hear arguments on both sides on it and they sound very reasonable, many of them are. It is also a very complicated area and one where consistency is also a virtue nationwide. So, I will submit some questions to you on that and I would be interested in your thoughts. We are not going to hold up—some of the questions go into issues you probably would not be able to

answer for a while, and I do not intend to hold up your confirmation and wait for that. Take a look at the questions and if there are some that you feel that you would rather be there a while and answer, I will certainly accept that. But eventually I would like to have some answers on some of these priorities related to the question I just asked you.

Mr. ROSE. I would welcome your letter, sir.

[The questions and answers referred to follow:]

Senator LEAHY. Does Senator Thurmond have any questions?

Senator Thurmond wants you just grilled, just grilled over here. [Laughter.]

If we have nothing further, then we will stand adjourned.

Mr. ROSE. Thank you, Mr. Chairman.

Senator LEAHY. Thank you.

[Whereupon, at 11:33 a.m., the committee adjourned.]

U.S. Department of Justice

Tax Division

Office of the Assistant Attorney General

Washington, D.C. 20530

November 18, 1987

Honorable Strom Thurmond
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

During the course of my recent confirmation hearing, you submitted to me in writing three questions which you requested that I give my written response. Accordingly, please accept this letter as responsive to your inquiries.

As to your first question, you stated as a premise that the primary functions of the Tax Division are to aid the Internal Revenue Service in collecting the Federal Revenue and to establish principles of law which will serve as guidelines to taxpayers and their representatives as well as to the Internal Revenue Service. Furthermore, you observed that the Tax Division usually works closely with the Chief Counsel of the Internal Revenue Service in deciding which tax cases to bring. Your inquiry elicited my views of the relationship between the Tax Division of the Department of Justice and the Internal Revenue Service in the area of litigation policy.

During my brief time with the Department of Justice, I have been impressed with the high degree of cooperation I have found between members of the Tax Division's staff and members of the Office of Chief Counsel, Internal Revenue Service. This cooperation exists not only at the managerial levels of the Office of Chief Counsel and the Tax Division, but also extends down to the "working attorney" level.

I have also been heartened to find that my perception that a team spirit moves the activities of Chief Counsel and the Tax Division is shared by my former compatriots in the Office of Chief Counsel. I have taken the time to visit with many of them in my early days here at Justice in an attempt to find whether

there were problems I should attempt to deal with. I have been pleased to find that, while there are discrete problems of tax policy, litigation strategy and resource management that must be addressed, no fences need be mended between the Tax Division and the Office of Chief Counsel.

I am in the process of setting up a series of meetings with Will Nelson, the Chief Counsel, to discuss how our two offices should deal with the challenges that face us. And I am confident that, together, we will find a way to deal with them.

Your second question stated as a premise that the Criminal Investigation Division (CID) of the Internal Revenue Service has over the years done a commendable job in their effort to deter criminal activity, particularly in the area of organized crime, white collar crime, and narcotic trafficking. However, you are concerned that insufficient assistance and support is provided to special agents of the Criminal Investigation Division. You have asked for my views on what I see as the role and importance of the criminal investigators of the Internal Revenue Service and their contribution to the Tax Division.

Almost without exception, prosecutions for criminal tax violations require the active participation of special agents of the Criminal Investigation Division (CID) of the Internal Revenue Service. We enjoy a good working relationship with CID, both in Washington and in the field. That organization has obviously made a commitment to provide us the support we and the United States Attorneys need to bring the approximately 2,900 tax prosecutions we file annually to a successful conclusion.

This is not to say that, with an underground economy estimated to exceed $100 billion per year in unreported tax, a good case could not be made for increasing the number of investigations (and prosecutions) that the Government conducts. We intend to work actively with the Internal Revenue Service to make sure that the resources available to CID are directed not only at the criminal elements which must be brought to justice, but also at the other types of tax cheaters who must be prosecuted if our system of voluntary compliance is to remain viable.

Your last question stated as a premise that there is always a backlog of tax collection cases in the Tax Division and your question was whether a greater priority would be given to alleviating the backlog of tax collection cases.

In conjunction with a Department-wide effort initiated late last summer, the Tax Division completed a study of its judgment collection efforts early in October of this year. We have established a program for intensive review of all judgments

outstanding, with a view toward closing out those cases in which no further collection is possible, transferring cases to the local offices of the United States Attorneys or the Internal Revenue Service when local collection efforts have more promise of success than our Washington-based efforts and generally increasing our efforts to effect collections on the remaining cases.

We are also about to meet with the Commissioner's staff and the staff of Chief Counsel, Internal Revenue Service, to see if we can elicit increased support for our collection efforts. We intend, at that time, to explore the possibility of bringing the Service into the collection pattern even earlier than we now do in the hope that this may increase our effectiveness.

I hope that you will find my response to your questions satisfactory and I would be pleased to provide you with any further comments or views concerning these matters.

Sincerely yours,

William S. Rose, Jr.
Acting Assistant Attorney General
Tax Division

Robert S. Gawthrop, III

Birth:	December 2, 1942	West Chester, Pennsylvania
Legal Residence:	Pennsylvania	
Marital Status:	Single	
Education:	1960 - 1964	Amherst College B.A. degree
	1967 - 1970	Dickinson School of Law J.D. degree
Bar:	1970	Pennsylvania
Military Service:	1964 - 1966	United States Army
Experience:	1969 - 1970	Law Clerk to Hon. Lee F. Swope, Court of Common Pleas of Dauphin County
	1970 - 1978	Gawthrop & Greenwood Associate
	1971 - 1978	Assistant District Attorney Wayne County
	1978 - present	Judge, Court of Common Pleas of Chester County
Office:	Chester County Courthouse West Chester, Pennsylvania 19380 215 431-6180	
Home:	342 West Miner Street West Chester, Pennsylvania 19382	

To be U. S. District Judge for the Eastern District of Pennsylvania

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

   Robert Smith Gawthrop, III

2. Address: List current place of residence and office address(es):

   Residence: 342 West Miner Street, West Chester, Pa 19382.

   Office: Chester County Courthouse, Courtroom 2, West Chester, Pa. 19380

3. Date and place of birth.

   December 2, 1942; West Chester, Pa.

4. Marital Status.

   Single.

5. Education. List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   Amherst College - 1960-1964 B.A. in Economics 1964.
   Dickinson School of Law - 1967-1970 J.D. 1970.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1978-Present	Judge, Court of Common Pleas of Chester County, West Chester, Pa. 19380.
1981-1982	Adjunct Professor of trial advocacy, Dickinson School of Law, Carlisle, Pa. 17013.
1/71-1/12/78	Assistant District Attorney, Chester County Courthouse, West Chester, Pa. 19380.
1976-1977	Appointed Assistant District Attorney of Wayne County, Pa., working with grand jury investigation.
9/70-1/2/78	Gawthrop & Greenwood, Esquires (now Gawthrop, Greenwood & Halsted), 119 N. High St., West Chester, Pa. 19380. General practice of law.
10/70-1/73	Singer with All Saints' Church, Gypsy Lane & Montgomery Avenue, Wynnewood, Pa. 19096.
6/69-5/70	Law Clerk for President Judge Lee F. Swope, Dauphin County Courthouse, Harrisburg, Pa. 17101.
1968	Apprentice lawyer, law clerk, Gawthrop & Greenwood, West Chester, Pa. 19380.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

RA13-834-535 Artillery OCS, January-July 5, 1965 (as officer candidate, carried as Sgt. E-5); Serial No. 05419271. Commissioned as 2nd Lt. Field Artillery, July 5, 1965. 1st Lt., September 1966-July 5, 1967, when honorably discharged. Presently retired.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

I received National Honors, Nathan Burkan Memorial Competition for essay, An Inquiry into Criminal Copyright Infringement, published in Copyright Law Symposium No. 20, Columbia University Press, 1972.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Chester County Bar Association
Pennsylvania Bar Association
American Bar Association
American Judicature Society
Pennsylvania Conference of State Trial Judges
member, Judicial Education Committee, 1984-present
Pennsylvania Trial Lawyers' Association
National District Attorneys Association,
Associate Member
The Federalist Society for Law & Public Policy
Studies

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Pennsylvania Bar Association
American Bar Association
Pennsylvania Conference of State Trial Judges
American Judicature Society
The American Cancer Society, Chester Co. Unit
(member, Board of Directors)

The Phelps School (member, Board of Directors)
The Savoy Company
The Ardensingers (former member, Board of Directors,
and former Gildmaster)
The Orpheus Club
The Gilbert & Sullivan Players, Philadelphia
The Chester County Gilbert & Sullivan Society
Delta Kappa Epsilon
Phi Mu Alpha Sinfonia
The Quarry Club
The Italian Social Club

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of Pennsylvania, November 18, 1970.
Court of Common Pleas of Chester County, Pa., November 9, 1970.
Federal Court, Eatern District of Pennsylvania, January 19, 1971.
Supreme Court of the United States, June 2, 1986.

No lapses of membership.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

An Inquiry into Criminal Copyright Infringement, published in Copyright Law Symposium No.20, Columbia University Press, 1972, enclosed herewith.

In the early 1970's, I co-authored a little book on Criminal Law, for the Pennsylvania Bar Institute, the continuing legal education arm of the Pennsylvania Bar Association, in conjunction with a program I was teaching for them. The book has long been superseded, and I do not have a copy.

"Some Thoughts from the Bench: Just What Constitutes the Constitution?", published in July of 1987 in the Bi-Centennial Commemorative Issue of New Matter, a publication of the Chester County Bar Association, at page 10, enclosed herewith.

I have no copies of speeches, as I only speak ex tempore, or from brief notes. I know of no press reports of any of my speeches.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent.

September 4, 1987, with William Plummer, M.D., 419 N. Franklin St., West Chester, Pa. 19380, tel. 215-696-3431.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Judge, Court of Common Pleas of Chester County, West Chester, Pa. 19380.
Elected November 8, 1977; have served from January 2, 1978, unto present.

From January of 1978 until April of 1980, I was the sole Family and Juvenile Court Judge in this county, as well as the Judge of the Orphans' Court Division. As such, my jurisdiction encompassed such matters as

custody and support, juvenile dependency and delinquency, will contests, trusts and estates, adoptions, and terminations of parental rights. During that period, I also did some of the regular common pleas docket. In April of 1980, I elected to move to general common pleas jurisdiction, in which I have been hearing all sorts of cases, except Federal, including zoning appeals, license suspension appeals, all types of criminal cases, from Murder One to DUI, all types of civil cases, from contract disputes, labor injunctions, medical malpractice, product liability, general negligence, libel, equity, tax sales, unfair trade practices, restrictive covenants, stockholders' suits, wrongful discharge, and so forth. I have also been Supervising Judge of both of this county's special investigating grand juries. I have held no other judicial office.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

(1) Commonwealth of Pennsylvania v. William MacDonald, CCP No. 86-01070 (Appeal to the Commonwealth Court withdrawn). (The opinion not having yet been published, a copy is enclosed).

Boyer v. Hicks, 29 Ches. Co. Rep. 411, 19 D&C 300 (1981) cited Standard Pennsylvania Practice 2d, Section 127:35 n. 52. (No appeal).

Flum v. Lichtenfeld, 30 Ches. Co. Rep. 418, 2 Fid. Rep. 2d 158, 39 D&C 3d 49 (1982). (Not appealed).

Grace v. Wood, 30 Ches. Co. Rep. 260 D&C 3d 1982), aff'd. on appeal 319 Pa. Super. 604, 466 A. 2d 710 (1983).

In Re: Estate of Penrose, 28 Ches. Co. Rep. 135, 30 Fid. Rep. 22 (1980). (No appeal).

Superior Beverage Co. et al v. Schweppes (USA) Ltd. et al, 33 Ches. Co. Rep. 12 (1985). Appealed; affirmed 2/21/85 1906 Phila. 1984.

Rogers Estate, 29 Ches. Co. Rep. 105, 17 D&C 3d 410, 30 Fid. Rep. 537 (1980). (No appeal).

In Re: Property of Moskowitz, 29 Ches. Co. Rep. 390, 31 D&C 3d 623 (1981), aff'd. 68 Cmwlth. Ct. 29, 447 A. 2d 1114 (1982).

Boyer v. Valentino, 33 Ches. Co. Rep. 26 (1984) Gawthrop, J. dissenting from the majority en banc opinion reported at 32 Ches. Co. Rep. 467. On appeal, rev'd. per curiam by the Superior Court.

McGinn v. McGinn, et al, 29 Ches. Co. Rep. (1979). (Appeal quashed).

(2) Commonwealth, Dept. of Transportation, Bureau of Traffic Safety v. Brown, ___Pa. Cmwlth. Ct. ___, 515 A. 2d 660 (1986).

In this case, a license suspension appeal, I was reversed for looking beyond the fact of the licensee's conviction for leaving the scene of an accident, looking at the merits. Briefly stated, the defendant had lent his car to his teenage son to go out on a date; the son had parked the car, was leaving the parking space, and nudged the bumper of the car ahead of him. The driver of the tapped car took down the registration number and reported the incident to the police, who tracked the registration to the father, who promptly paid his son's fine, thereby triggering a plea of guilty for himself. I held that to suspend the father's license for six months on the basis of a false presumption that he was operating his car - a presumption which has expressly been held unconstitutional in this Commonwealth - was plainly wrong, and that the Commonwealth's attorney, having a duty, under EC 7-14, not to institute or continue litigation that is obviously unfair, should withdraw the appeal to let the underlying conviction (i.e., the payment of the fine without notice of the ancillary consequence of half-year loss of license) be litigated de novo. The Commonwealth Court disagreed.

Commonwealth v. Lyles, 315 Pa. Super. 194, 461 A. 2d 1237 (1983).

In a 2-1 panel decision, I was reversed for arresting judgment for an alleged violation of Pennsylvania's speedy trial rule, as to whether the Commonwealth had been duly diligent in monitoring a hospitalized defendant's availablity for trial. The case also changed the law, as noted in Judge Spaeth's dissent, as to whether the first day of a period when a defendant is unavailable is to be excluded from the computation. The difference in that day, taking credit for it from the defendant, and crediting it to the Commonwealth, ultimately made the difference as to whether trial was timely.

Reed v. Hutchinson, 331 Pa. Super. 404, 480 A. 2d 1096 (1984).

In a jury trial, I had permitted, over objection, a state trooper, who had been a trooper for approximately a year and a half before the accident in question, and who had taken at the State Police Academy a twenty-four-hour course in accident investigation and accident analysis, to give an opinion, apparently based on a gouge in the road and a wheel having been found off the road, twenty-five feet to the rear of the vehicle, that the accident was caused by the falling off of the wheel. Following the general Pennsylvania rule that one with a "reasonable pretension to specialized knowledge on the subject under investigation is qualified as an expert", I cautioned the jury to receive the testimony with care and that the weight of that testimony was for them. After a defendant's verdict, plaintiff appealed, and the Superior Court held that I should have sustained the objection to the trooper's opinion testimony, vacating judgment and remanding for a new trial.

Naus & Newlyn, Inc. v. Mason, 295 Pa. Super. 208, 441 A. 2d 422 (1982).

After five days of hearings, comprising more than 900 pages of testimony, and full briefing of the issues by the parties, I had granted a six-month preliminary injunction upon a restrictive covenant agreement, including in my order thirty findings of fact and four conclusions of law. The court concluded that my making definitive findings of fact and legal conclusions transferred what was to be a preliminary injunction into, in effect, a final hearing on the merits, vacated and and remanded.

Commonwealth, Department of Transportation v. Cassidy, ___Pa. Cmwlth. Ct. ___, 521 A. 2d 442 (1987).

In a license suspension appeal for alleged refusal to submit to a breathalyzer test, I had held that the licensee's synergistic effect of dizziness and illness, resulting from his brain's having had a modest amount of alcohol mixed with a prescription drug he was taking, which his doctor had failed to warn him not to take with alcohol, rendered the licensee innocent of his refusal. In so doing, I took judicial notice of the Physician's Desk Reference, which corroborated the consequences of the chemical mixture. The Commonwaelth Court found that I had erred in taking such judicial notice, and thus reversed.

Commonwealth, Pennsylvania Liquor Control Board v. Demutis, ___Pa. Cmwlth. Ct.____, 510 A. 2d 154 (1986).

In this liquor license case which I heard, de novo, at least three of the six facts presented by the Liquor Control Board were changed - e.g., the church, located within the proscribed 300 feet of the proposed licensed premises, had withdrawn its objection, voiced at the administrative hearing, to the license transfer. At hearing de novo, the court may reverse only if the Board has committed a clear abuse of discretion or the facts elicited at that hearing differ from those found by the Board. Under the latter doctrine, since the facts elicited before me were significantly different, I exercised my discretion in reversing the Board. The Commonwealth Court held that I erred as a matter of law in so doing, since two of the initial six factual findings were still made out, and reversed.

Morelli v. Morelli, ___Pa. Super.___, 462 A. 2d 789 (1983).

Sitting en banc in this case, the court had vacated another judge's having transferred, ex parte, without hearing, the lawsuit from the old divorce code he began under to the Divorce Code of 1980. The order was entered when another aspect of the case was on appeal, the en banc court concluding it still had jurisdiction over the unappealed aspects of the case, under Pennsylvania Rule of Appellate Procedure 1701(c), which limits the divestiture of lower court jurisdiction to matters in dispute on appeal. The Superior Court, however, vacated the en banc order vacating the ex parte order, saying that it had been entered without jurisdiction, because of the appeal. The remainder of the appeal was either affirmed or quashed.

Coatesville Development Co. and Giant Food Stores, Inc. v. United Food and Commercial Workers et al, Chester Co. No. 84-08225 (my opinion, being unpublished, is enclosed; since the Superior Court's panel opinion, reversing, and Judge Beck's dissent, are also yet unpublished because reargument en banc has been granted, I enclose those opinions as well).

This equity case involved a labor union's peacefully picketing at the parking lot, located on private property, of a shopping center, in front of a supermarket which was experiencing a strike. I refused to enter the injunction, holding that the rights of freedom of speech, assembly, and petition guaranteed by the Pennsylvania Constitution prevailed over the private property rights of the owner of the parking lot. A panel of the Superior Court reversed 2-1, holding essentially that the property rights preyail over the union's rights to freedom of expression.

Commonwealth v. Maurice Chambers, 34 Chester 110 (1984).

The Superior Court reversed me, in an unpublished opinion, on the basis that my hypothetical example of circumstantial evidence, which I gave the jury in my charge, paralleled too closely the facts of the case on trial, to the prejudice of the defendant. Reversed and remanded for new trial.

Commonwealth v. Terry Maute, 2450, 2451, 0715, 1982. (Superior Court slip opinion unpublished).

I was reversed for not setting forth with sufficient specificity at time of sentencing why I had exceeded the discretionary sentencing guidelines when I imposed sentence upon this multiple burglar pursuant to his guilty pleas. The case was remanded for resentencing.

Commonwealth v. Burke, Superior Ct. No. 01298 PHL 86.

I had permitted evidentiary impeachment of a defendant in a DUI case upon the Commonwealth's theory that the defendant had "opened the door" when he said he had "nothing to hide" from a breathalyzer machine to which he had refused to submit, but later blew a .14%. I allowed questioning on that percentage's possibly being something to hide, since it is well over the .10% threshold in this Commonwealth, but the Superior Court reversed, stating that I had erred in concluding that the "door had been opened" when the defendant said he "had nothing to hide from the machine". Petition for Allowance of Appeal to the Pennsylvania Supreme Court has been filed and is presently pending.

McKown v. Board of Supervisors of East Fallowfield Township, ___Pa. Cmwlth. Ct.___, 522 A. 2d 159 (1987).

I held that East Fallowfield Township was not on the path of growth out of Philadelphia, and thus, its zoning ordinance, as enacted, sufficiently allowed for mobile home development, thereby denying a request for a curative amendment to permit development of a 80-acre tract of land into a mobile home park. In so holding, I based my decision on the Commonwealth Court's holding in Fernley v. Board of Supervisors of Schuylkill Township, 464 A. 2d 587, then the law. When the case

was decided by the Commonwealth Court, however, the Supreme Court had reversed the Commonwealth Court's decision in Fernley, at 502 A. 2d 585, causing the Commonwealth Court to follow Fernley II, by then the law. The Commonwealth Court reversed, 4-3, holding that the ordinance did not set aside sufficient land for the mobile home park.

Commonwealth v. Billy Robert Hipp, Superior Court No. 235 Philadelphia, 1985 (filed October 6, 1987).

In a suppression hearing preceding a DUI trial, I held that the regulations of a state administrative agency, providing for confidentiality of medical records, were overruled, or superseded by a statutory provision providing for their admissibility, and I thus permitted the results of the defendant's blood test to be introduced into evidence. That portion of my holding was affirmed on appeal, but a panel of the Superior Court reversed, 2-1, based on an issue which had not been argued before me. They held that where a hospitalized defendant refuses to submit to a blood-alcohol test, the results of a test administered by the hospital for medical purposes are also inadmissible at trial in order to give full effect to defendant's "right of refusal". The District Attorney's Office has advised me that they are seeking further appellate review of this ruling.

(3) Morelli v. Morelli, 28 Chester Co. Rep. 247.

I held unconstitutional, as a violation of the Equal Rights Amendment to the Pennsylvania Constitution, the common-law rule that the wife has a duty to abide by the husband's choice of suitable residence, that the decision is entirely his. The Superior Court affirmed per curiam, with an unpublished memorandum opinion.

In re Adoption of D.R.C., 27 Chester Co. Rep. 346.

I held that a foreign divorce decree, entered without constitutionally sufficient notice, violates due process and is not entitled to full faith and credit in this Commonwealth. Not appealed, but further hearings reported at 27 Chester Co. Rep. 352 (1978), and 27 Chester Co. Rep. 355 (1979).

In re Adoption of S.L.M, 27 Chester Co. Rep. 479.

I held that the Pennsylvania statute governing involuntary termination of parental rights violated neither Due Process nor Equal Protection under the facts of that case. The case was not appealed.

Commonwealth v. Carter, 29 Chester Co. Rep. 34.

I held that a defendant is entitled to a continuance to obtain money to hire private counsel of his own choosing, in recognition of his Sixth Amendment rights. The case ultimately resulted in a conviction, which was affirmed in an unpublished opinion on appeal.

Commonwealth v. Sutton, 30 Chester 458.

I held that an indigent defendant does not have a Sixth Amendment right to fire his public defender without a good reason, and then select a particular replacement lawyer; nor may the Public Defender fire an unpleasant client merely because of that unpleasantness.

Coatesville v. Giant Foods et al, cited above in 15(2)

This involves significant constitutional questions concerning freedom of expression, and the right to assemble and petition for grievances.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I was an Assistant District Attorney in Chester County from January, 1971 to January 2, 1978, when I went on the bench; the position was appointed.

I was a law clerk to Judge Lee F. Swope, an appointed position.

I was appointed Assistant District Attorney of Wayne County, Pa., in 1976 and 1977.

I have had no unsuccessful candidacies for elective public office.

17. Legal Career

a. Describe chronologically your law practice and experience after graduation from law school, including:

1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.

Yes. President Judge Lee F. Swope, Court of Common Pleas of Dauphin County, Harrisburg, Pa. 17100 June, 1969-May, 1970. (I clerked for Judge Swope my senior year in law school - before graduation.)

2. Whether you practiced alone, and if so, the addresses and dates:

No.

3. The dates, names, and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each:

I was engaged in the practice of law with the firm of Gawthrop & Greenwood (now Gawthrop, Greenwood & Halsted), 119 North High Street, West Chester, Pa. 19380. I clerked for them in the summer of 1968, and was associated with them in the general practice of law from 1970 until I went on the bench, January 2, 1978.

I was appointed Assistant District Attorney of Chester County, January 1971-January 2, 1978. Trial and appellate practice.

Appointed Assistant District Attorney of Wayne County, Pa. in 1976. Worked with the grand jury investigation of the Farview State Hospital for the Criminally Insane, including investigating evidence and examining witnesses before the Grand Jury.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

While in private practice, I did civil defense work, representing a number of insurance companies. I had a domestic practice and did some federal work, the principal case being defending the Board of Trustees of West Chester State College in a civil rights action. I was involved in such areas of civil litigation as child custody and non-support, divorce proceedings, automobile accident cases, contractual litigation, proceedings in equity, landlord-tenant actions, medical malpractice, and products liability. On the criminal side, I started with

96-183 0 - 89 - 23

smaller cases such as driving under the influence, but soon moved to the prosecution of major cases such as murder, robbery, rape, drugs, burglary, conspiracy, forgery, rioting. I also prosecuted some of the more esoteric crimes, such as wiretapping, and telephonic fraud, or "blue box" cases.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

As mentioned, much of my civil practice consisted of insurance defense work, in which I represented such companies as Aetna Casualty & Surety, Firemen's Fund, the Travelers, Liberty Mutual, as well as just the general practice of law. As a prosecutor, I spent most of my career prosecuting major felonies, both in the trial courts, and arguing the cases on appeal, representing the Commonwealth of Pennsylvania.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Regularly.

2. What percentage of these appearances was in:

(a) Federal courts	1%
(b) state court of record	95%
(c) Other courts	4%

3. What percentage of your litigation was

(a) Civil	±20%
(b) Criminal	±80%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Over 100; almost always I was sole counsel, occasionally chief counsel. On very rare occasions, I was associate counsel.

5. What percentage of these trials was

a. Jury	±95%
b. Non-jury	± 5%

18. Describe ten of the most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participationin the litigation and the final disposition of the case. Also state as to each case:

a) the date of representation
b) the name of the court and the name of the judge or judges before whom the case was litigated; and

c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. Commonwealth v. Carl Sterling Garnett, 22 Chester 45 (1973), aff'd. at 458 Pa.4, 326 A. 2d 335 (1974). This case, a difficult rape-murder prosecution, was the first Chester County case in decades in which the death penalty was sought. I handled the suppression hearing, reported at 20 Chester 216 (1972), as well as the trial, representing the Commonwealth. I wrote much of the brief on appeal, but didn't make the argument, as I was hospitalized at that time. The case involved a number of legal and factual questions concerning the right to counsel at defendant's interrogation, as well as who had in fact committed the crime. Much of the circumstantial evidence consisted of items such as moving blankets stamped with the name of a local moving company for which the defendant worked, as well as clothesline used to wrap those blankets around the body when it was left in a creek. At trial, the defendant took the stand, stated that his confession was coerced, and announced that the actual perpetrator of the crime was his stepfather, who lived with him and his mother, and who worked for the same moving company, thus having equal access to the circumstantially damning blankets and rope. In addition to bringing the stepfather in in rebuttal to deny the defendant's accusation, I called a detective to the stand to testify in impeachment only, under the then-recent decision of Harris v. New York, 401 U.S. 222, (1972). After a lengthy and arduous trial, the defendant was convicted of Rape and Murder in the First Degree.

During the penalty phase, I undertook the genuinely awesome task of arguing in favor of the electric chair, and ultimately, the jury hung, 11-1, for death. The one holdout, incidentally, was a black woman I had left on the jury, since I have always found it repugnant to have a black defendant (Mr. Garnett was black) tried by an all-white jury, particularly in a capital case. I kept the juror even though the trial was governed by Swain v. Alabama, 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1985), antedating Batson v. Kentucky, 476 U.S. ___, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), by 13 years. Although the case has been fully appealed, and collaterally attacked, the convictions still stand.

The case was tried from March 13 until March 18, 1972, in the Court of Common Pleas of Chester County. (In the interest of saving space, I mention that all the ten cases I shall be describing were tried in that court, and in all of them I was representing the Commonwealth.) Judge Thomas A. Pitt, Jr., presided. At trial, I did not have co-counsel, but on appeal, my co-counsel were William H. Lamb, Esquire, 22 E. Market St., West Chester, PA. 19380; tel. 215-692-3592; F. Ned Hand, Esquire, 249 Anthony Wayne Drive, Wayne, Pa. 19087; tel. 215-688-5421, and Timothy H. Knauer, Esquire, 218 W. Miner St., West Chester, Pa. 19380; tel. 436-4140. Counsel for defendant at trial was

V. Clayton McQuiddy, III, Esquire, Western Insurance Management Corp., Centre Place, 1900 E. 4th St., Suite 100, Santa Ana, CA. 92705; tel. 714-541-2800, and on appeal, John R. Merrick, Esquire, 117 S. Broad St., Kennett Square, Pa.; tel. 215-444-5060.

2. Commonwealth v. Joseph Mascaro, CCP No. 221-76, 25 Chester 63 (1977), aff'd. 251 Pa. Super. 602, 381 A. 2d 898 (1977), I tried on June 28, 29, 1976. The case entailed a two-car collision, in which we proved that the defendant drove his car at a high rate of speed through a stop sign, into an intersection, killing a man lawfully driving into the intersection in the through street. The interesting significance to the case is that it was tried entirely without eyewitnesses; instead, the accident was reconstructed for the jury, with an expert opining from the final locations of the vehicles, the skid marks, and the damage to the cars' bodies. The jury convicted the defendant of involuntary manslaughter, and the Superior Court affirmed on appeal. I personally tried the case for the Commonwealth, and briefed and argued it on appeal. Francis R. Lord, Esquire, 15 W. Front St., Media, Pa. 19063, tel. 215-5657500, represented the defendant at trial. On appeal, the defendant was represented by A. Charles Peruto, A. Charles Peruto, Jr., and Perry de Marco, Esquires, Washington W. Bldg., 8th & Locusts Sts., Phila., Pa. 19106, tel. 215925-5800. The Honorable Thomas A. Pitt was the presiding judge, and the dates of trial were June 28-29, 1976.

3. Commonwealth v. Lowell Kratz, CCP No. 404-77, was a prosecution for Breach of Privacy of Telephone Communications, 18 Pa. C.S. §5702. The Commonwealth asserted that the defendant, a party in a divorce contest, had placed a wiretap and tape recorder on a lead line to his wife's telephone, thereby overhearing not only all her phone conversations, but, in particular, her private and privileged conversations with her own divorce lawyer. The case was fraught with difficult proof problems, in seeking to tie in the installation of the tape recorder to the agency of the defendant. When that became proved, defense counsel shifted his strategy, attempting to ridicule the case as being de minimis, something that properly belonged not in the criminal courts, but in family court. In summation, I sought to refute that argument, by telling the jury that the case was probably the most important they could be called upon to determine, since their guilty verdict would constitute a proclamation of the continuing vitality of the Bill of Rights, reaffirming the right to privacy, the right to speak with one's own lawyer, free from aural trespass.

The jury convicted the defendant and the case was affirmed on appeal. I am told that the consequent civil rights suit, relying upon the criminal verdict to establish liability as a matter of law, makes this case a leading one in the nation, standing for the proposition that one is legally prohibited from invading a separated spouse's personal privacy.

The case was tried October 30-November 1, 1977, before the Honorable Thomas A. Pitt, Jr., and a jury. Defense counsel was Fred T. Cadmus, III, Esquire. As an Assistant District Attorney, I had no co-counsel.

4. Commonwealth v. Helen Patricia Davis, CCP No. 348-77, was a prosecution for third-degree murder. The particular significance of the case is that the killing was accomplished not by the usual means, such as knife blade or bullet, but by an errantly-driven automobile. Because of the defendant's particularly horrendous driving, I elected to prosecute her for third-degree murder, in addition to involuntary manslaughter, under the theory that her actions, although not demonstrative of an intentional killing, fell within the Commonwealth's definition of malice ("wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty"). The case was tried June 27-July 1, 1977, before the Honorable Thomas A. Pitt, Jr., and the jury convicted her of murder. Posttrial motions were denied, and the defendant was sentenced to the State Correctional Institution at Muncy. I went on the bench before her appeal ran its course, but I understand that that was mooted because, sadly, she died in jail. I prosecuted the case alone, and defense counsel was John B. Hannum, Jr., Esquire, Department of Agriculture, Chief Counsel's Office, 2301 N. Cameron St., Harrisburg, Pa. 17110; tel. 717-787-8744.

5. Commonwealth v. John J. Duffy, Jr., 238 Pa. Super. 161, 353 A. 2d 50 (1975), a prosecution of a fellow lawyer for several offenses, including criminal conspiracy.

   The case evolved from a phone call from one of the defendant's frequent clients, a recidivist, who called the defendant to tell him that he had just been arrested at a shopping center, but that his car, which was stolen and full of stolen goods, was outside in the parking lot. He asked the defendant to remove the car from the shopping center and to clean it out of contraband and burglary tools, and wipe it clean of fingerprints. The defendant, with a companion who turned out to be the chief Commonwealth witness, complied with the request.

   The case was significant because it had appalling problems of proof. The defendant's traveling companion, for instance, had admittedly stolen a check from his employer on the very day of the incident and had taken it across the street to forge and cash during the middle of the very scenario to which he was testifying, the planning of the car-retrieval trip. He also, an admitted convict and drug addict, cheerfully conceded that he first brought the charges against Mr. Duffy in order to shake him down for money. Further, there was serious question whether the unindicted co-conspirator who made the initiating phone call, would testify, or would take the Fifth, which, if done in the presence of the jury, would prompt a mis-trial. After defense counsel in his opening

statement skillfully derided that witness, wondering why the Commonwealth would even call him, I elected to present him as my first witness, but, in order to avoid any Fifth Amendment problems, only asked him to give his name and to provide certain handwriting exemplars,corresponding with stolen checks removed from the car. Having avoided anything testimonially self-incriminating, on direct, I offered him to defense counsel for cross-examination. Defense counsel took the bait and launched into questioning as to what had happened on the evening in question, whether the defendant had in fact called. The defendant's response, "could be", I found useful in summation. The case is also significant, standing for the propriety of entering a plea of surprise.

The defendant, Mr. Duffy, was convicted of conspiracy (his co-defendant, Frederick Paup, was acquitted). Judgment of sentence was affirmed by the Superior Court. Opposing counsel was John Rogers Carroll, Equire, 1206 One Independence Mall, Philadelphia, Pa. 19106, tel. 215-925-4100, and I represented the Commonwealth alone. The trial judge was the Honorable Lewis Meyer, a visiting judge, specially assigned, from Lebanon County, Pa.

6. Commonwealth v. Charles Elbert Mabry, CCP No. 909-74, was a rape case which I prosecuted to jury verdict, the Honorable John E. Stively, Jr., presiding, from January 13 to January 15, 1975. The case was significant, and difficult in proving lack of the victim's consent, in that the rape had admittedly caused her to have an orgasm. I produced medical evidence to the effect that an orgasm was not necessarily indicative of voluntary, consensual intercourse, but rather, could be simply the result of the physical touching of certain parts of the anatomy, physiologically, but involuntarily, triggered. After a three-day trial, and after about an hour of deliberation, the jury convicted the defendant of rape. No appeal was filed, and the defendant was sentenced to a jail term. of the Legal Division, Phillips Petroleum Co., Bartlesville, Oklahoma 74003, and George M. Paulson, Jr., Esquire, then of the Philadelphia Bar, whose present address is unknown to me.

7. Commonwealth v. Gary Bates, CCP Nos. 1532-1522-76, 27 Ches. Co. Rep. 213 (1979), a murder prosecution involving a drug enforcer hit man who point-blank shot an alleged pusher in the head, was tried upon March 7 to March 17, 1977, before the Honorable John E. Stively, Jr., and a jury. It is difficult to pinpoint the precise legal significance of the case, other than to note that it was fraught with proof problems. It does involve a particularly effective use of the doctrine of prior consistent statements in the manner in which the Commonwealth's star witness, the defendant's accomplice, was presented. Through that hearsay exception, I adduced testimony from that witness's lawyer that when he had first interviewed the witness and asked him about the case, the witness had then said - long before any plea bargain was struck - that the killer was indeed the defendant, Bates.

The case is also significant for the pioneering use of videotape to record the witness's testimony at the preliminary hearing. I decided to do this to give them a sort of technological immortality so that their main testimony could be played at trial, even if they were murdered in the interim. The defendant, through counsel, was so advised of the preservation of their testimony, and of its admissibility at trial. (We had reason to believe that the defendant, who had previously been convicted of another murder, had unimprisoned confederates who would not hesitate to kill to help his litigious cause.) After a nearly two-week trial, the defendant was convicted of First Degree Murder. Defense counsel was R. Kerry Kalmbach, Esquire, 213 E. State St., Kennett Square, Pa. 19348, tel. 215-444-4848. I tried the case alone. It was affirmed per curiam by the Supreme Court of Pennsylvania on May 5, 1981; Post Conviction Hearing Petition was denied by court order October 26, 1984, with opinion filed March 3, 1986.

8. Commonwealth v. Carl Bruno Wike, CCP No. 338-75, was an interesting case in which the defendant, having been enraged by years of brutality by his father, sought to strangle him with an extension cord, stabbed him multiple times in the throat with a steak knife, and then put his yet-live body into a car trunk, took him to the back woods, pulled him from the car, poured gasoline over him, ignited the pyre, and left him to die, which he did, a month later, of sepsis.

   The case was significant in difficulty, mainly from a psychiatric and psychological standpoint, as there was much to suggest that the victim had been sufficiently horrible to the defendant over the years, and immediately before the killing, as to provide justification for his actions.

   The case was tried before the Honorable Thomas A. Pitt, Jr., from May 12 to May 16, 1975. The defendant was sentenced to life imprisonment for 1st Degree Murder.

   Much later, on post conviction attack alleging ineffectiveness of defense counsel, ineffectiveness was found, and the defendant was granted a new trial, upon the reasoning that defense counsel should have been able to track down a favorable psychiatrist to testify. (He had interviewed but one, who was not favorable to the defense.) The defendant ultimately pleaded guilty to 2nd Degree Murder. Defense counsel was D. Benjamin van Steenburgh, III, Esquire, Gold Key Lake, Box 2334, Milford, Pa. 18337, tel. 717-686-1362. I tried the case alone.

9. Commonwealth v. William Jeffrey Pyle, CCP Crim. No. 119 Sept. 1973, 462 Pa. 613, 342 A. 2d 101 (1975), was and is the leading case in Pennsylvania on the section of the Juvenile Code governing transfer of homicide cases from adult to juvenile court. I represented the Commonwealth at the transfer hearing, held August 15, 1973, before the Honorable Ralph W. Kent, now deceased, and at the

guilty plea, to second degree murder, on May 31, 1974, before the Honorable D. T. Marrone. I adduced testimony from defendant's psychiatric expert that it would probably take longer than three years, or in any event, beyond the defendant's minority, before he could be rehabilitated; therefore, he would most likely have been out of the jurisdiction of the juvenile court before he was rehabilitated. It was on this basis that I argued, and the courts, trial and appellate, found it appropriate to keep the defendant in the adult system. Defense counsel was Michael B. Kean, Esquire, 325 W. Miner St., West Chester, Pa. 19382, tel. 215-431-3636. I represented the Commonwealth, solo, both in the Court of Common Pleas and before the Supreme Court of Pennsylvania.

10. Commonwealth v. Robert Helms and Kenneth Spacil, CCP No. 282 Sept. 1971, 234 Pa. Super. 537, 343 A. 2d 362 (1975), was a prosecution for cheating the telephone company out of fees by using a device known as a "blue box". The case was significant in that it constituted the first appellate judicial pronouncement in Pennsylvania that the telephone company, consistent with an exclusion in the anti-wiretapping statute, had a right to monitor illegal phone calls in order to verify the presence and detect the source of telephonic theft. Although the precise holding of this case was that the company's monitoring had been overly pervasive in the circumstances at bar (a holding with which I, speaking not as an advocate, happen to agree), and thus suppression of the evidence was required, the ultimate significance of the decision rests in its dictum, recognizing the exception to the statute.

I handled the suppression hearing for the Commonwealth, held on May 25, 1973, before the Honorable John Wajert, as well as the Superior Court appeal, for which I wrote the brief. As I recall, I did not argue the appeal, as I was hospitalized at the time. Co-counsel on appeal was Timothy H. Knauer, Esquire, 218 W. Miner St., West Chester, Pa. 19380, tel. 215-436-4140; I handled the suppression hearing alone, opposed by Michael B. Kean, Esquire, 325 W. Miner St., West Chester, Pa. 19380, tel. 215-431-3636, for Spacil, and Jon J. Auritt, Esquire, 130 W. State St., Media, Pa. 19063, tel. 215-565-7520, for Helms. On appeal, Helms was pro se, and Spacil was represented by John R. Merrick, Esquire, 117 S. Broad St., Kennett Square, Pa. 19348, tel. 215-444-5060, and Michael Barranco, Esquire, then of the Public Defender's Office, Courthouse, West Chester, Pa. 19380, who now practices law somewhere in Florida, I believe.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege).

When I was practicing law, I had a number of cases which either settled or pleaded out. Perhaps the most memorable was Commonwealth v. Richard O.J. Mayberry, reported at 23 Chester Co. Rep. 328, 335, 339, and 343. That case, in which Mr. Mayberry (the same Mayberry as in the leading contempt case, Mayberry v. Pennsylvania, 400 U.S. 455), was suing in the Eastern District of Pennsylvania to have penal conditions in the state correctional system ameliorated. When he was being escorted back to Chester County Prison, where he was being housed during these proceedings, he pulled a gun and shot a guard in the head, in an attempt to escape. There was considerable trial litigation, as evidenced in the cited opinions pertaining to a challenge to the array of the grand jury, change of venue alleging prejudicial pretrial publicity, a motion to suppress evidence, and the matter of pleading the bill of indictment. After the Commonwealth prevailed on these matters, the case pleaded out on a plea bargain of ten to twenty years, during a period of time when I was hospitalized in New York.

There are a number of other cases which settled out, but it seems that many of my cases ended up going to trial. With respect to other significant legal activities which I have pursued, I think my involvement in teaching, both of lawyers, and of judges, has occupied much of my time. For nearly a decade, I taught and planned the so-called "Bridge the Gap" course of the Pennsylvania Bar Institute, in which practicing lawyers would teach recent law school graduates practical considerations in the various areas of the laws, to assist in their transition from school to the real world of the practice of law. I have also taught with the Pennsylvania Bar Institute in such areas as legal writing and evidence, and I have taught lawyers at the Dickinson Forum, the Academy of Advocacy, the Dickinson School of Law Trial Advocacy Seminar, at which I was an Adjunct Professor, as well as lecturing a bit on panels for the Pennsylvania Bar Association Young Lawyers' Division Annual Meeting, in which I have given practical tips to the practicing lawyer from the vantage point of the bench. In addition, I have been most active in teaching trial judges, having lectured and moderated panels in such areas as criminal procedure, constitutional law, evidence, techniques of handling a jury, and judicial ethics. Further, I have been in charge of a course for newly-elected judges throughout the Commonwealth for the past several years now.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I anticipate stock options/receipts from the following securities held by me:

Shares	Company
200	British Petroleum
15	Campbell Co.
74	Centel, Inc.
200	Drexel Equity Fund
200	Echo Bay Mines, Ltd.
5	General Motors Class E
50	General Motors Corp.
200	Goodyear Tire & Rubber Co.
100	IU International Corp.
15	Lonestar Industries, Inc.
40	Lukens Steel Co.
128	McDermott International, Inc.
66	Old Stone Corp.
240	Panhandle Eastern
451	Reading Bates, Inc.
90	State Street Investment Corp.
1039	Strawbridge & Clothier
100	Textron, Inc. Pfd.
240	Anadarko Petroleum Co.
2	General Motors Class H.
33	Gotaas-Larsen Shipping Corp.
74	Western Power & Gas (Centel)

I also am a vested beneficiary of a testamentary trustof my maternal grandmother, Elizabeth H. Hilliard. A copy of the trust agreement is enclosed, and the financial interests held by that trust, individually held by me, are set forth fully in the enclosed Schedule of Investments as of July 15, 1987.

I have a retirement plan with the Administrative Office of the Pennsylvania Courts. It has not yet vested, as it requires ten years of service for that. If I were to leave this bench before the end of that decade, which comes the first Monday in January, 1988, I could and would buy in my military time, thereby vesting. Which of the various financial options I would choose I do not yet know for certain, although my inclination would be to withdraw the lump sum amount to which I am entitled, which is invested by the Commonwealth at 4% interest, and then reinvest it. To provide a fuller explanation of the way in which the arrangement operates, I am enclosing a copy of my projected Retirement Benefits, which I asked the Administrative Office of the Pennsylvania Courts to work up for me, should the Federal appointment come to pass, together with the cover letter therefor.

2. Explain how you will resolve any potential conflict of

interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will recuse myself. If I hold an asset that presents a recurring conflict of interest, I would sell it, and after a reasonable interval, consistent with avoiding appearance of impropriety, and after disclosure to the parties, I would then deem myself no longer precluded from hearing such cases. In any event, I will, of course, fully abide by the tenets of the Code of Judicial Conduct and the American Bar Association ethical standards.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have been cast to sing a role for one weekend with Opera Delaware at the Grand Opera House in Wilmington, Delaware, next March. I presume my only remuneration would be expenses. With the prospect of a new judicial job, however, I would quickly ascertain whether that created an untenable time conflict. If there were any question as to that, I would resolve it in favor of the judiciary and my new duties, and forthwith tell my director to find herself another baritone.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

I enclose my Financial Disclosure Report, as suggested.

5. Please complete the attached financial net worth statement in detail.

Enclosed.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes, once. In the fall of 1973, I was Campaign Chairman for the Chester County Republican Party. Three judges were running, Judges Leonard Sugerman, John M. Wajert, and John E. Stively, Jr. (Judge Stively was then yet a lawyer). Also various row offices, such as Clerk of Court, and Jury Commissioner were on the ticket. My principal duties were to introduce the candidates at various area meetings and generally to organize and oversee the campaign. I was involved in the campaign for approximately one month.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

It has been nearly a decade since I was permitted to practice law, and my memory of specific instances of pro bono work has by now largely faded. I did, however, often represent clients for a reduced fee, and from time to time for no fee at all. This I did on an informal basis, and did not make record of each such instance. Also, perhaps to a degree bordering on economic folly, I was not a lawyer who would drop his representation of a client at the moment when the money ran out; once I took on a client's cause, I would stay with the case to the end. I also, as mentioned, have spent a good deal of time teaching, gratis, as well as in various charitable endeavors, such as for the Cancer Society. In addition, I often give of my time to sing for charities, such as at nursing homes.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list with dates of membership. What have you done to try to change these policies?

To my knowledge, I have never belonged to any group with formal membership requirements that invidiously discriminates on the basis of race, sex, and religion. The Orpheus Club of Philadelphia, a man's singing group, discriminates in that it is precluded by its By-Laws from taking women, but I do not regard that as invidious. The reason why women are not eligible to join is that the group confines itself to the musical literature of a men's glee club, which is, of course, beyond the range and timbre of the female voice. I am a social member of West Chester's Italian Social Club, which only takes full members who are either personally, or married to one, of Italian descent. I cannot say that that discrimination is invidious.

I also often sing roles with The Savoy Company, a Philadelphia Gilbert & Sullivan troupe, which I joined in 1980. Again, that organization has no formal membership requirement excluding on the basis of race, but to my knowledge, no blacks, for example, belong. I know of no occasion when anyone has been rejected from the organization on the basis of race.

Since 1980, I have been a member of The Quarry Club, a swimming hole a few miles south of my home. Again, although there is no formal discriminatory membership policy, I know of no blacks who are members. During 1976 and 1977, I was a member of the West Chester Golf & Country Club. Again, there is no formal exclusionary policy, but I know of no blacks who are members. Years ago, I was told that the Club discriminated against Jews, but that practice has long since ended. In any event, I quit that Club about a decade ago.

Should I continue to be a member of these organizations and should the issue of racism in membership arise, I would vigorously urge that any suggestion of racism, sexism, or religious discrimination be repudiated, and should the organization decline to accept my argument, I would forthwith comply with the Commentary to Clause 2 of the American Bar Association's Code of Judicial Conduct.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is a merit selection committee in Pennsylvania, fourteen citizens, lay and lawyers, from across the Commonwealth, equally selected by Senators Specter and Heinz. My experience in the entire judicial selection process began in the spring of 1986, when I, upon learning that a vacancy had arisen on the bench of the Eastern District of Pennsylvania, and that more vacancies were probably imminent, sent for and submitted a questionnaire to the Senators' Merit Selection Committee. Thereafter, they interviewed me, first in the morning in front of a panel of three, and then, later that day, before the entire Committee. The members of the Committee asked me numerous questions about my personal and professional background, and my general judicial philosophy.

Meanwhile, in September of 1986, I was invited to the Department of Justice to be interviewed for a possible position on the Third Circuit Court of Appeals. That lasted a full day, with interviews with a number of Assistant Attorneys General, asking questions about my background and experience, and Socratically probing my thought processes. I was asked, for example, whether, if I were confronted with an Act of Congress that constitutionally proclaimed the law to say one thing, yet I believed the law should say otherwise, I would decide the case in accord with my personal sentiments, or in accord with the law. I replied that I would follow the law.

Later in 1986, two more seats opened up on the Eastern District, and each time I was reinvited to interview with the Senators' 14-member committee, and underwent the same process. These interviews became increasingly short, as by then the Committee and I were getting to know each other rather well.

In June of 1987, I was again invited to the Department of Justice to interview, this time for the Eastern District. This process was similar to the one I had undergone the previous September, except that it was briefer, as I had aleady met and spoken at length with many of the interviewers, and they remembered me. For each Justice interview, I was asked to, and did, submit a resume.

In July of 1987, I was interviewed for a couple of hours by two Special Agents for the FBI, at the start of their background investigations, and I gave them my completed Form 86 (Security Investigation Data for Sensitive Position).

In August of 1987, I sent my American Bar Association Questionnaire, with enclosures, to Robert B. Fiske, Esquire, Chairman, and Jerome J. Shestack, Esquire, both of the Standing Committee on Federal Judiciary, and I am scheduled to interview with Mr. Shestack on October 7, 1987.

In September of 1987, I sent my completed Financial Questionnaire to the Justice Department, as well as my medical reports.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism".

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

It has been my experience as a judge that, perhaps paradoxically, but nevertheless, appropriately, the position is in many ways a passive one. I do not choose what cases I will hear or will not; I adjudicate those cases which come into my courtroom, and I neither may nor do reach out to decide those that do not. The same is true for the issues. With a very few exceptions, (e.g., questions invading the attorney-client privilege or questions asking a witness about his religious beliefs, as to which I will interpose my own objection, if the lawyers do not, those sensitive areas being prohibited by statute in Pennsylvania), I do not raise issues sua sponte, and I do my very best to resist the occasional temptation to lace an opinion with obiter dictum on some point of interest to me, but ancillary to the issues in the case. I try to keep my eye on the issues joined by the parties and decide those issues, and thus the case, on a fair analysis of the salient facts and an honest construction of the applicable law; in construing the law, I subscribe, as I must, to the doctrine in this Commonwealth that the court although always remaining cognizant of legislative intent, should not disregard the clear language of a statute under the pretext of pursuing its spirit.

In deciding a case, although I confine myself simply to the judicial task of deciding the case, I remain mindful that what I say and do can later be cited as precedent, having a far-reaching impact beyond the bounds of that particular matter. I thus choose my language and draft my decisions with care, recognizing that any sentence or word in an opinion is susceptible of being taken as authority beyond the bounds of the case at bar.

I neither have the expertise nor the time to serve as a super-administrator, a function which I deem inappropriate for a judge.

As for standing, some examples may illuminate my views. I have sua sponte raised the question of whether children whose support orders a parent wishes to terminate, have standing in order to give them notice and an opportunity to be heard. I recently permitted the owner of property fronting a road to intervene in a case in which the legal status - public or private - of that road was to be adjudicated. During oral argument, however, I noted that if a prospective intervenor, who lived at another part of the county, but who just happened to be interested in the road in question, would probably not have standing to intervene.

AFFIDAVIT

I, Robert Smith Gawthrop, III, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

13 October 1987
(DATE)

Robert S. Gawthrop
(NAME)

Barbara A. Babb
(NOTARY)

BARBARA A. BABB, NOTARY PUBLIC
WEST CHESTER BORO, CHESTER COUNTY
MY COMMISSION EXPIRES NOV. 7, 1988
Member, Pennsylvania Association of Notaries

AMERICAN BAR ASSOCIATION
Standing Committee on
Federal Judiciary
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

CHAIRMAN
Harold R. Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112
FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101
SECOND CIRCUIT
William E. Willis
125 Broad Street
New York, NY 10004
THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103
FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510
FIFTH CIRCUIT
Lloyd Lochridge
Suite 1100
919 Congress Avenue
Austin, TX 78701
SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215
SEVENTH CIRCUIT
Joan M. Hall
Suite 4100
One IBM Plaza
Chicago, IL 60611
EIGHTH CIRCUIT
James W. Hewett
Post Office Box 80268
1815 Y Street
Lincoln, NE 68501
NINTH CIRCUIT
J. David Andrews
1900 Washington Building
Seattle, WA 98101
Samuel L. Williams
45th Floor
355 South Grand Avenue
Los Angeles, CA 90071
TENTH CIRCUIT
James A. Clark
Suite 1900
303 East 17th Avenue
Denver, CO 80203
ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Post Office Box 78
2 Dexter Avenue
Montgomery, AL 36101
DISTRICT OF COLUMBIA CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 I Street, NW
Washington, DC 20006
FEDERAL CIRCUIT
John D. Lane
Suite 600
1666 K Street, NW
Washington, DC 20006
BOARD OF GOVERNORS LIAISON
Sharp Whitmore
2005 Gird Road
Fallbrook, CA 92028
STAFF LIAISON
Irene R. Emsellem
2nd Floor, South Lobby
1800 M Street, NW
Washington, DC 20036
(202) 331-2210
ABA/NET: ABA 461

November 2, 1987

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: ROBERT S. GAWTHROP III
United Stated Distri t Court
for the Eastern District of
Pennsylvania

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Robert S. Gawthrop III for appointment as Judge of the United States District Court for the Eastern District of Pennsylvania.

A substantial majority of our Committee is of the opinion that Judge Gawthrop is "Well Qualified" for this appointment. The minority found him to be Qualified.

Sincerely yours,

Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

DEAN WHIPPLE

Birth:	April 3, 1938	Lebanon, Missouri
Legal Residence:	Missouri	
Marital Status:	Married	Jeanette Miller Whipple
Education:	1956 - 1961	Drury College B.A. degree
	1961 - 1962	University of Tulsa School of Law
	1963 - 1965	University of Missouri at Kansas City School of Law J.D. degree
Bar:	1965	Missouri
Experience:	1965 - 1975	Private Practice
	1967 - 1971	Prosecuting Attorney Laclede County
	1975 - present	Circuit Judge, Division II 26th Judicial Circuit of Missouri
Office:	118 West Commercial Lebanon, Missouri 65536 417 588-1133	
Home:	Route 7, Box 237-P Lebanon, Missouri 65536	

To be United States District Judge for the Western District of Missouri

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

   Harold "Dean" Whipple

2. Address: List current place of residence and office address(es).

   Residence -- Route 7, Box 237-P
   Lebanon, Missouri 65536

   Office -- 118 West Commercial
   Lebanon, Missouri 65536

3. Date and place of birth.

   April 3, 1938 -- Wallace Hospital - Lebanon, Missouri

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   Married to Jeanette Elaine (Miller) Whipple --

   Kindergarten Teacher -- Lebanon R-3 Public Schools
   321 South Jefferson
   Lebanon, Missouri 65536

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   Drury College, Springfield, Missouri
   September, 1956 to January, 1961
   Degree: Business Administration and Economics - May, 1961

   University of Tulsa, School of Law, Tulsa, Oklahoma
   September, 1961 through May, 1962
   During the summer of 1963 I transferred to the University of Missouri at Kansas City School of Law.

   University of Missouri at Kansas City School of Law
   September, 1963 to January, 1965
   Degree: Juris Doctorate Degree - January 22, 1965

   University of Missouri at Kansas City School of Law
   January, 1965 through August, 1965
   L.L.M. Graduate School - ten hours earned
   I did not receive a L.L.M. Degree as I entered private practice in Lebanon, Missouri, and found it impossible to commute to Kansas City to continue my schooling.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

[H. Dean Whipple]

6. Employment Record: (continued)

January, 1975 to Present	--	State of Missouri 26th Judicial Circuit
June, 1965 to January, 1975	--	Self-Employed (Attorney) 120 West Commercial Lebanon, Missouri
January, 1967 to June, 1971	--	Laclede County (Prosecuting Attorney) Courthouse Lebanon, Missouri
March, 1966 to August, 1967	--	Co-Owner of Slot Car Track St. Roberts, Missouri
October, 1964 to May, 1965	--	Kansas City Title Ins. Co. 1025 Grand Kansas City, Missouri
August, 1964 to October, 1964	--	Marion-Jackson Co. 1025 Grand Avenue Kansas City, Missouri
June, 1964 to July, 1964	--	General Motors Leeds Plant Kansas City, Missouri
September, 1963 to May, 1964	--	Full-Time Student Law School Kansas City, Missouri
April, 1963 to August, 1963	--	U.S. Steel Corporation National Tube Division Philtower Building Tulsa, Oklahoma
September, 1962 to April, 1963	--	Unemployed
June, 1961 to September, 1962	--	National Trailer Convoy North Sheridan Tulsa, Oklahoma

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Yes.

Missouri National Guard: May, 1956 through August, 1961.
U.S. Army Active Reserve: August, 1961 through June, 1966.

Rank: Specialist E-6; MOS: Helicopter Crew Chief

Serial Number: 27558245

Type of Discharge: Honorable

[H. Dean Whipple]

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

National Honor Society; 1955-1956

Dean's Honor List, University of Missouri, Kansas City, School of Law -- Graduate School

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Missouri Bar -- May 1, 1965 to Date

Appointed to the Young Lawyer's Council of The Missouri Bar when it was originally formed in 1968; served on the Council from 1968 through 1973.

Member of the Executive Committee of the Young Lawyer's Council from 1968 through 1971.

Young Lawyer's Representative to the Tort Law Committee from 1969 through 1971.

Young Lawyer's Representative to the Property Law Committee in 1972.

Member of the Public Information Committee of The Missouri Bar; 1971-1972.

Member of the Judiciary Committee of The Missouri Bar; 1971-1972.

Member of the Board of Governors of The Missouri Bar from September, 1975 to Date.

Board Liaison to Criminal Law Committee of The Missouri Bar from 1975 to 1985.

Board Liaison to Client Security Fund of The Missouri Bar; 1985-1987.

Member of Executive Committee of The Missouri Bar Board of Governors; 1983-1984.

Member of Executive Committee of The Missouri Bar Board of Governors; 1986-1987.

Member of the Planning Committee for the Annual Meeting of The Missouri Bar; 1985.

Chairman of the Planning Committee for the Annual Meeting of The Missouri Bar; 1986.

Member of the Planning Committee for the Annual Meeting of The Missouri Bar; 1987.

Member of Selection Committee for the Lon Hocker Award, The Missouri Bar; 1986.

[H. Dean Whipple]

9. Bar Associations: (continued)

American Bar Association -- 1965 to Date.

Judicial Administration Division of American Bar Association -- 1979 to Date.

Laclede County Bar Association -- June, 1965 to Date. [President -- 1968-69; 1972-73]

South Central Missouri Bar Association -- 1975-1984.

26th Judicial Bar Association -- 1985 to Date.

Missouri Trial Judges Association -- 1975 to Date.

Attended and participated in the Missouri Judicial Conference each year I have been on the bench; 1975-1986.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

a) The Missouri Bar
American Bar Association

b) Member of Phi Delta Phi Legal Fraternity

Active member of the United Methodist Church of Lebanon, Missouri, serving in Youth Education, Sunday School teacher, member of the Administrative Board, Chairman of the Administrative Board, member of the Board of Trustees, member of Commission on Evangelism and member of the choir.

Member of Missouri Heritage Trust; 1978 to Date.

Member of Missouri Historical Society; 1975 to Date.

Board Member of Lebanon Area Foundation; 1985 to Date.

Board Member of Springfield Little Theater; August, 1986 to Date.

Member of Laclede County Historical Society, Lebanon, Missouri; 1982 to Date.

Member of Donnelly Elementary School P.T.A.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Missouri Supreme Court -- May 1, 1965 to Date.

United States District Court, Western District of Missouri -- June 11, 1965 to Date.

Supreme Court of the United States -- June 8, 1970 to Date.

[H. Dean Whipple]

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent.

June 30, 1987.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Circuit Judge - 26th Judicial Circuit of Missouri - Division II

I was initially elected to this position in 1974 and reelected in 1980 and 1986.

The Circuit Court is a general trial jurisdiction court of the State of Missouri which has jurisdiction over all matters at the trial level, including civil, criminal and juvenile cases.

I sit in five counties: Camden County, Laclede County, Miller County, Moniteau County and Morgan County.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

(1) the ten most significant opinions you have written;

I sat as special judge in the Southern District Court of appeals, September 8, 1986, at the invitation of the Court. We heard oral arguments on seven cases and I was assigned two opinions to draft. I am enclosing photocopies of those two opinions. These are the only two opinions I have written that will be published.

As I have only had two opinions published I am attaching photocopies of eight significant opinions I have written at the trial court level (they have not been published).

[See Attachment I]

[H. Dean Whipple]

15. Citations: (continued)

(2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

GRANTHAM, et ux.,
vs. 721 S.W.2d 242 (Mo.App. W.D. 1986)
SHELTER MUTUAL INSURANCE CO.

Granthams brought suit on a property insurance policy. The case was tried as a court-tried matter and the Court found the Granthams were entitled to recover the cash value of their sterling silver that had been stolen.

The Appellate Court affirmed but remanded with directions for the trial court to calculate prejudgment interest and add that to the Grantham's judgment.

* * * * *

RAY,
vs. 714 S.W.2d 928 (Mo.App. S.D. 1986)
LAKE CHEVROLET-OLDSMOBILE

Lake Chevrolet appealed the trial court's denial of their motion to set aside a default judgment that had been obtained by Ray. Ray had his car repaired at Lake Chevrolet in Miller County, Missouri. Ray brought suit in Camden County where Ray lived, contending that the cause of action accrued there because his car broke down after being delivered to him in Camden County.

The Appellate Court ruled the proper venue was Miller County and reversed and remanded with direction to dismiss.

* * * * *

HOWELL, et al.,
vs. 710 S.W.2d 902 (Mo.App. S.D. 1986)
AUTOBODY COLOR COMPANY, INC.

Autobody initially filed suit against Howell in 1984 for an alleged unpaid account. At the trial the only witness for Autobody was Randy Rush who testified he was Office Manager for Autobody and testified to Autobody's capacity to sue and the unpaid account. Autobody lost the suit. Before Randy Rush left the courthouse that day the Sheriff served process on him for a suit Howell's had filed against Autobody for defamation of their credit reputation. Autobody did not defend the suit and the trial court entered default judgment against Autobody.

Autobody then filed a motion to set aside the default judgment claiming service of process on their Office Manager was not valid service. Autobody's motion was denied and they appealed.

The Appellate Court agreed with Autobody's position and reversed and remanded the case.

* * * * *

[H. Dean Whipple]

15. Citations: (continued)

MAROSE, et al.,
vs. 697 S.W.2d 279 (Mo.App. S.D. 1985)
DEVES, et ux.

Deves began building two two-family residences in a subdivision in violation of subdivision restrictions. Marose brought this action asking the trial court to grant them injunctive relief. The trial court, after hearing the case, granted Marose's request and stopped Deves's construction project and ordered him to convert the two units he had already built to single-family dwellings.

The Appellate Court affirmed the trial court in all respects except it ordered that Deves get approval of David Marose and Phyllis Marose to make the court-ordered changes to single-family dwellings.

* * * * *

KNOTHE,
vs. 691 S.W.2d 297 (Mo.App. W.D. 1985)
BELCHER

Knothe brought a personal injury suit against Belcher, the owner and operator of a boat Knothe was riding in when the boat hit a dock. The case was tried before a jury who returned a verdict for Knothe and against Belcher, awarding Knothe five thousand dollars in damages. Knothe appealed claiming inadequacy of verdict and alleged misconduct of Defendant who talked to a juror during a recess in the trial.

The Appellate Court reversed and remanded for a new trial finding that the trial court erred in not holding an evidentiary hearing on Knothe's allegation of Defendant and juror talking to each other. The trial court had accepted an affidavit filed by Belcher that he "didn't have any conversations relating to my case with any jurors at any time."

* * * * *

VILLAGE OF CLIMAX SPRINGS,
vs. 609 S.W.2d 733 (Mo.App. S.D. 1980)
CAMP, et al.

(and)

VILLAGE OF CLIMAX SPRINGS,
vs. 681 S.W.2d 589 (Mo.App. S.D. 1984)
CAMP, et al.

The Village appealed the first case after the trial court found that the Village did not own the land they were attempting to Quiet Title on because Defendant Ollison had purchased the land at a tax sale held by the Camden County Collector and because the Village had assessed and collected taxes on the property from 1965 through 1978 from Ollison.

[H. Dean Whipple]

15. Citations: (continued)

The Appellate Court reversed and remanded, holding that assessing and collecting taxes by a municipal corporation alone does not constitute abandonment or prohibit them from claiming title to the land.

On retrial the trial court held the Village had title and entered its decree vesting the Village with title in fee simple.

The Appellate Court found the Village held an easement for public purposes subject to reversion. The case was reversed and remanded for revision and possible correction of the decree.

* * * * *

OSAGE OUTDOOR ADVERTISING,
vs.
MISSOURI HIGHWAY AND
TRANSPORTATION COMMISSION
677 S.W.2d 389 (Mo.App. S.D. 1984)

Osage Outdoor Advertising applied for a permit to erect a billboard and Missouri Highway and Transportation Commission denied their application. Osage then erected the sign and Missouri Highway and Transportation Commission issued an order to Osage to remove the sign. Osage demanded and received an administrative hearing on Missouri Highway and Transportation Commission's refusal to issue the permit and challenging the order to remove. The hearing officer affirmed the action of the Missouri Highway and Transportation Commission finding the notice to remove to be proper.

The trial court reversed, holding that the Highway Commission had errored in refusing to issue the requested permit.

The Appellate Court held that Osage had unlawfully erected the sign without a permit and the sign could not remain pending determination of the lawfulness of the location. The judgment of the trial court was reversed and the order of the Commission directing removal was reinstated.

* * * * *

ROMANUS, et ux.,
vs.
AMERICAN TRIAD LAND
COMPANY, et al.
675 S.W.2d 122 (Mo.App. W.D. 1984)

Romanus brought this action against two corporate defendants and three individual defendants invoking the provisions of the Interstate Land Sales Full Disclosure Act. Romanus requested avoidance of a sales contract they had entered into to buy a resort development lot, for refund of payments made and damages for loss of bargain. The corporations and three individual defendants were served with process and an attorney entered his appearance for all defendants on December 4, 1980. No pleadings were filed by defendants or their attorney and on April 23, 1982, Romanus filed a motion

[H. Dean Whipple]

15. Citations: (continued)

for default judgment. The motion for default judgment was noticed up for hearing on March 18, 1983 and defendants and their attorney failed to appear and default judgments were entered against all defendants as prayed. All defendants appealed.

The three individual defendants appealed on the basis that plaintiffs' petition sought relief only against the corporate defendants. The Appellate Court agreed and reversed the judgment as to the three individual defendants.

The corporate defendants claimed on appeal that plaintiffs' damages exceeded what they could recover under the existing Statute and they were entitled to an evidentiary hearing on damages. The Appellate Court reversed as to damages awarded for "Loss of Bargain" and remanded the case for hearing on the amount of damages under the then existing Statute, but affirmed as to liability against corporate defendants.

* * * * *

FISHER, et ux.,
vs.
SCOTT & FETZER COMPANY, et al. 664 S.W.2d 662 (Mo.App. W.D. 1984)

Fishers brought action against the manufacturer of a trailer hitch alleging the hitch was defective. Scott and Fetzer, after pursuing discovery, filed their motion for summary judgment contending that there was no direct evidence of any defect of the trailer hitch, thus Fishers could not prove any defect except by circumstantial evidence. The court granted Scott & Fetzer's motion for summary judgment and Fishers appealed.

The Appellate Court ruled Fishers could prove defect by circumstantial evidence and there was thus a substantial fact issue raised. Case reversed and remanded for trial.

* * * * *

ELLIS,
vs.
WESTERN ELECTRIC COMPANY 664 S.W.2d 639 (Mo.App. S.D. 1984)

Missouri Labor and Industrial Relations Commission awarded Ellis compensation after finding her husband had been killed in the course of his employment when he was involved in a car accident while returning to his "temporary transfer" job location on Sunday evening. His base location was St. Louis, Missouri and his temporary job location was in the Camdenton, Missouri area. Western Electric work rules provided that they would pay an employee a per diem when he must work further than fifty miles from his base location; Camdenton, Missouri is more than fifty miles from St. Louis.

The trial court reversed the Missouri Labor and Industrial Relations award on the basis that the deceased was not "within the scope of his employment" when returning to his temporary job site on Sunday evening so he could go to work the next morning.

[H. Dean Whipple]

15. Citations: (continued)

The Appellate Court reversed saying he was within the scope of his employment when going to his temporary job location. The award of the Commission was reinstated.

* * * * *

MORRIS,
vs. 663 S.W.2d 785 (Mo.App. W.D. 1984)
PERKINS CHEVROLET, INC.

Morris sued Perkins for breach of contract that arose over the parties negotiating the purchase and sale of a car. At the close of Morris's evidence Perkins moved for a directed verdict on the basis that Morris had not made a submissible case. The trial court granted Perkins's motion for a directed verdict.

The Appellate Court reversed and remanded for a new trial saying that although Morris had failed to prove specific damages there were sufficient facts for the finder to find damages.

* * * * *

MARTIN,
vs. 661 S.W.2d 593 (Mo.App. W.D. 1983)
MARTIN

The former wife filed a motion to modify to increase alimony. The former husband filed a counter motion to decrease his alimony payments to his former wife. Evidence was presented by husband and wife and the trial court ordered the alimony reduced to fifty dollars per month and to terminate altogether when the wife reached her sixty-fifth birthday.

The Appellate Court affirmed the reduction in alimony but reversed the trial court's order terminating alimony in the future on the basis that there was no substantial evidence of a prospective change of circumstances.

* * * * *

FEESE,
vs. 648 S.W.2d 638 (Mo.App. S.D. 1983)
ANDERSON

Feese sued Anderson contending Anderson's negligency caused a collision between Feese's motorcycle and Anderson's automobile. A jury found for Anderson and Feese appealed claiming the trial court errored in not allowing his attorney to comment in closing argument on the failure of Anderson to call her husband as a witness.

The Appellate Court concluded that Anderson's husband likely knew facts relevant to the issues at trial and as he was not "equally available" to Feese the comments were proper. The case was reversed and remanded for new trial.

* * * * *

[H. Dean Whipple]

15. Citations: (continued)

ORVIS, et al.,
vs. 638 S.W.2d 773 (Mo.App. S.D. 1982)
GARMS, et al.

Mr. and Mrs. Orvis, and three other plaintiffs, filed this suit to establish an easement for ingress and egress across Garms's land. After trial of the case the trial court found for defendants.

The Appellate Court affirmed the trial court's denial of an easement to two plaintiffs but reversed the trial court as to the other three plaintiffs and remanded the case for judgment to be entered granting those three plaintiffs an easement over Garms's property.

* * * * *

GROVES,
vs. 628 S.W.2d 420 (Mo.App. W.D. 1982)
HALL

Groves sued Hall on a promissory note. Hall filed an answer and counterclaim. Hall failed to appear for trial and default judgment was entered for Groves. Hall filed a motion to set aside the default judgment that was denied by the trial court.

The Appellate Court found Hall was not given proper notice of the trial setting and reversed and remanded the case for further hearing.

* * * * *

BAULDIN,
vs. 606 S.W.2d 444 (Mo.App. 1980)
BARTON COUNTY MUTUAL
INSURANCE COMPANY

Bauldin filed the cause of action against Barton County Mutual claiming Barton had refused to pay Bauldin in full for a fire loss covered under Barton's policy. Barton filed a motion to dismiss because Bauldin had not filed her cause of action "within twelve months next after the inception of the loss," as state law provided. The trial court sustained Barton's motion and Bauldin appealed.

The Appellate Court ruled that the trial court should have treated Barton's motion to dismiss as a motion for summary judgment and allowed both parties reasonable opportunity to present pertinent material to support their positions. The case was reversed and remanded with directions to treat Barton's motion as a motion for summary judgment and allow both parties a reasonable opportunity to present all pertinent material.

* * * * *

[H. Dean Whipple]

15. Citations: (continued)

STATE OF MISSOURI,
vs. 599 S.W.2d 182 (Mo.Sup. 1980)
BIDDLE

Biddle was tried and convicted of first degree robbery based on circumstantial evidence and evidence that Biddle had failed a polygraph test. Before Biddle took the polygraph test he entered into a written agreement with the State that either side could introduce the polygraph results into evidence at trial.

The Supreme Court of Missouri reversed; ruling that polygraph examinations lack wide scientific approval of their reliability and are inadmissible even though Defendant agreed to their admission at trial. The Supreme Court further ruled there was insufficient circumstantial evidence to support Biddle's jury conviction. The case was reversed and remanded for retrial.

* * * * *

LAURIE, et ux.,
vs. 595 S.W.2d 336 (Mo.App. S.D. 1980)
EZARD, et al.

Laurie instituted an action against Ezard for damages and injunctive relief on July 17, 1969. On May 28, 1978 the Court sustained Ezard's motion to dismiss for failure to prosecute and Laurie appealed.

The Appellate Court held the trial court abused its discretion in dismissing the action at a time when Lauries were actively pursuing the case, even though there had been a prior period of inactivity. Reversed and remanded.

* * * * *

HAYS,
vs. 594 S.W.2d 369 (Mo.App. W.D. 1980)
HAYS

The father filed a motion to modify divorce decree. The mother requested the father pay her cost of transporting the child for the times she was responsible for the transportation from visitation with the father and the mother requested the father pay her attorney fees. The trial court, after hearing the evidence, modified the father's visitation and denied the mother's request for transportation costs and attorney fees.

The Appellate Court sustained the trial court's modification of visitation but reversed the trial court's denial of transportation costs and attorney fees. The case was remanded with the instruction that the trial court modify its judgment to order father to pay transportation costs of the child and to pay the mother five hundred dollars attorney fees.

* * * * *

[H. Dean Whipple]

15. Citations: (continued)

CHAMBERS,
vs. 592 S.W.2d 542 (Mo.App. W.D. 1979)
STATE OF MISSOURI

Chambers filed a motion to set aside his conviction of assault with intent to kill claiming ineffective assistance of counsel for counsel failing to call witnesses Chambers wanted called. The trial court denied Chamber's motion without a hearing.

Chambers appealed and the Appellate Court ruled that the trial court should hold an evidentiary hearing to hear the witnesses Chambers said were not called at trial. The case was reversed and remanded for evidentiary hearing.

* * * * *

STATE OF MISSOURI,
vs. 585 S.W.2d 267 (Mo.App. S.D. 1979)
WELLS

Wells was tried and convicted of two counts of stealing and one count of tampering with a motor vehicle. Wells appealed, claiming an instruction was given out of place and the State's Information did not state the name of the owner of the car Wells had tampered with.

The Appellate Court affirmed the two stealing convictions finding no error but reversed the tampering count because the name of the car's owner was not given in the Information.

* * * * *

ANDREWS,
vs. 583 S.W.2d 592 (Mo.App. S.D. 1979)
ANDREWS

The trial court heard the parties' case and entered a decree of dissolution from which the mother appealed.

The Appellate Court first stated a recasting of the facts would provide undue embarrassment to the parties and serve no useful purpose. The Court then found the decree in part to be against the weight of the evidence and ordered the judgment and decree reversed and remanded with directions to amend and modify the decree as specified by the Appellate Court.

* * * * *

HAYES,
vs. 575 S.W.2d 816 (Mo.App. S.D. 1978)
CARDWELL

Plaintiff appealed the ruling of the Camden County Probate Court denying her two claims, stated in the alternative, against the estate of James O. Cardwell, to the Circuit Court. The Defendant here is James H. Cardwell, the administrator of the estate of James O. Cardwell.

[H. Dean Whipple]

15. Citations: (continued)

At the Circuit Court jury trial plaintiff testified to acts and contracts done or made prior to the appointment of the administrator and in her own favor against the administrator as to transactions with the deceased.

Defendant's attorney made repeated objections to the testimony as being barred by Missouri's Dead Man's Statute. After hearing argument of counsel the trial court permitted the testimony on the basis that the administrator had waived the Dead Man's Statute by cross-examining the plaintiff at the trial in the probate court.

The Appellate Court ruled that the defendant had not waived the Dead Man's Statute either as to the "transactions proviso" or as to the "administration proviso". The case was reversed for a new trial.

* * * * *

STATE OF MISSOURI,
vs. 568 S.W.2d 276 (Mo.App. W.D. 1978)
NEWMAN

Defendant was convicted by a jury of murder in the first degree and he appealed contending the State committed reversible error on cross-examining defendant as to length of time defendant served in prison on a prior conviction defendant had testified to on direct examination and if defendant had been placed on probation and violated his probation.

The Appellate Court held that the State can only ask defendant about the nature of his prior convictions and the number and it is error to inquire further about defendant's prior convictions. The case was reversed and remanded for new trial.

* * * * *

JO B. GARDNER, INC.
vs. 564 S.W.2d 632 (Mo.App. W.D. 1978)
BEANLAND

Gardner filed two claims against the estate of Henry Beanland and was allowed two hundred dollars on one claim and nothing on the second claim by the probate court. Gardner filed a notice of appeal but failed to file her appeal bond within thirty days after judgment, as required by Missouri Statute. Beanland filed a motion to dismiss Gardner's appeal for failure to post the bond as required and the trial court sustained Beanland's motion ruling that posting the bond was jurisdictional.

Gardner appealed and the Appellate Court said failure to file an appeal bond is a mere irregularity and did not deprive the trial court of jurisdiction to hear the case. The judgment was reversed and remanded.

* * * * *

[H. Dean Whipple]

15. Citations: (continued)

(3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

STATE, ex rel. PUBLIC DEFENDER COMMISSION,
vs.
COUNTY COURT OF GREENE COUNTY
667 S.W.2d 409 (Mo.Sup. 1984)

Public Defender Commission sought mandamus compelling the Greene County Court to provide office space and utility service for public defender for the 31st Judicial Circuit (comprised of Greene County).

The Greene County Court refused to provide the office space and utilities on the basis of Missouri Constitution Article X, Section 21, which mandated state funding for new local services required by a state agency. The effective date of this Article was December 4, 1980.

The Public Defenders Office contended that the Statute exempting the 31st Circuit from maintaining a public defenders office was passed in 1976 was special legislation and unconstitutional.

The trial court denied the writ, accepting the County Court's position.

The Missouri Supreme Court reversed and held that the Public Defender's position was correct. The case was remanded directing the trial court to issue the writ directing the County Court to provide the Public Defender office space and utilities.

* * * * *

INDEPENDENT STAVE COMPANY, INC.
vs.
HIGDON
572 S.W.2d 424 (Mo.Sup. 1978)

The company brought this cause of action seeking a permanent injunction from enforcement of a "union security" provision requiring compulsory union membership. The company contended such a contract provision was in violation of Article I, Section II of the Missouri Constitution.

The trial court granted the company's injunction finding the company's position to be correct.

The Supreme Court reversed saying such a clause was permissible under Article I, Section II of Missouri's Constitution.

* * * * *

96-183 O - 89 - 24

[H. Dean Whipple]

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

(a) Candidate for Laclede County, Missouri, Prosecuting Attorney, 1966, 1968 and 1970. -- Elected and served, January, 1967 through June, 1971.

Candidate for Republican Laclede County Committeeperson, 1970 and 1972. -- Elected and served as committeeperson and county chairman, January, 1970 through December, 1974.

(b) Candidate for City Attorney of Lebanon, Missouri, 1972. Was not elected.

17. Legal Career:

(a) Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No.

2. whether you practiced alone, and if so, the addresses and dates;

No.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

In June of 1965 I entered into the private practice of law in association with T. Victor Jeffries at 120 West Commercial, Lebanon, Missouri. I continued this private practice from that date until I was sworn in as Circuit Judge, Division II, 26th Judicial Circuit, on January 6, 1975.

(b) 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

From the time I started practicing law in June of 1965, until I became Prosecuting Attorney in January, 1967, the bulk of my practice was in real estate, contracts, wills and civil litigation, with some practice in criminal matters in city traffic courts, magistrate courts and circuit courts.

[H. Dean Whipple]

17. Legal Career: (continued)

Upon assuming the office of Prosecuting Attorney in January of 1967 I prosecuted all criminal matters in Laclede County, Missouri, for four and one-half years.

Approximately ninety percent of my time was devoted to the Prosecuting Attorney's Office and my private practice was very limited. When time permitted, my private practice consisted of real estate work, divorce cases, contracts, wills and limited civil litigation.

After leaving the office of Prosecuting Attorney in June of 1971 I devoted all of my time to my private practice and I continued with the real estate work, contract and will drafting, all phases of civil litigation, bankruptcy and criminal work. After a short time at least half of my practice consisted of criminal defense work.

On June 1, 1971, I purchased an existing abstract and title insurance plant in Camden County, Camdenton, Missouri, and phased that into my private practice, which increased the amount of real estate and title insurance work in my office. I maintained my office in Lebanon, Missouri, but did considerable work out of the abstract and title insurance office in Camdenton, Missouri.

When I assumed the position of Circuit Judge in January of 1975 I felt it was necessary to divest myself of my abstract and title business. I wanted to make certain that I would avoid any appearance of conflict of interest since attorneys who would practice in my court would also be in continuous contact with the above abstract and title business. Consequently, I sold this business in August, 1975.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My typical clients were individuals charged with misdemeanors or felonies, individuals buying or selling real estate, and individuals needing to file civil claims against another. Other clients included businessmen, corporations, individuals and corporations needing an attorney to defend them on a civil claim, individuals having domestic relations problems and, generally, individuals needing legal advice and representation.

(c) 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearance in court varied, describe each such variance, giving dates.

[H. Dean Whipple]

17. Legal Career: (continued)

During my time in private practice I appeared in court regularly on court-tried and jury-tried cases.

As Prosecuting Attorney I appeared in court almost daily. Most of the criminal work was court-tried, although many cases were jury tried.

2. What percentage of these appearances was in:

(a) federal courts;

3%

(b) state courts of record;

90%

(c) other courts.

7%

3. What percentage of your litigation was:

(a) civil;

50%

(b) criminal.

50%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

This is an estimate as I do not have any records that are available myself or from the courts I practiced in to obtain exact numbers.

Criminal Jury	--	42
Co-Counsel in	--	3
Sole Counsel in	--	39
Civil Jury	--	19
Co-Counsel in	--	6
Sole Counsel in	--	13
Court Tried	--	350
Co-Counsel in	--	4
Sole Counsel in	--	346

5. What percentage of these trials was:

(a) jury;

15%

(b) non-jury.

85%

[H. Dean Whipple]

17. Legal Career: (continued)

I would also like to answer Question 17, c. 2, 3, 4 and 5 as applies to my time as a general trial jurisdiction judge in Missouri.

For the period of time, January 1, 1975 through December 31, 1981, the State Court Administrator's Office only kept statistics as to the number of dispositions of cases in three categories: criminal, civil and juvenile hearings. For that seven-year period my dispositions were as follows:

Criminal	1321
Civil	3672
Juvenile	471

In 1982 the Court Administrator's Office began to break down statistics to indicate jury trials, court-tried matters, guilty pleas and juvenile hearings. Their statistics for me for the period of time from January 1, 1982 through May 31, 1987 are as follows:

Jury trials	70
Court-tried	1280
Guilty Pleas	1999
Juvenile	163

From these cases, in twelve and one-half years, there have been eighty-five appeals with the following results:

Affirmed	56
Reversed	22
Reversed and Remanded	7

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

[Please see following pages.]

[H. Dean Whipple]

Laclede County Circuit Court

State of Missouri,	]	
	]	
Plaintiff,	]	
	]	
vs.	]	No. 1837
	]	
Homer Ginnings,	]	
	]	
Defendant.	]	

Dean Whipple
Prosecuting Attorney

Orville Winchell [Deceased]
Counsel for Defendant

Trial Date: May 27, 28 and 29, 1969

Location: Lebanon, Missouri

Trial Judge: Judge Leroy Snodgrass [Deceased]

Summary: Prosecuted Defendant for first degree murder. I did pretrial investigation, trial preparation and tried the case. The case was tried to a jury for three days and Defendant was found guilty and sentenced to life imprisonment.

Significance: A difficult case to try with many witnesses in the yard and house where the shooting took place but no eyewitness. The case demonstrated that a conviction can be obtained with good investigation, trial preparation and trial presentation.

Conviction affirmed on appeal, 466 S.W.2d 675 (Mo. 1971).

[H. Dean Whipple]

Laclede County Circuit Court

State of Missouri,]
]
Plaintiff,]
]
vs.] No. 1849
]
Wayne A. Quick,]
]
Defendant.]

Dean Whipple
Prosecuting Attorney

John F. Low
Counsel for Defendant
206 North Jefferson
P.O. Box 370
Lebanon, Missouri 65536
(417) 532-3151

Trial Date: February 5, 1969

Location: Lebanon, Missouri

Trial Judge: Judge Leroy Snodgrass [Deceased]

Summary: Prosecuted Defendant for assault with intent to kill his estranged wife. I did the bulk of the investigation, all of the trial preparation and tried the case to a jury who found Defendant not guilty.

Significance: There were two eyewitnesses to the shooting. The jury found Defendant not guilty because, as one juror told me at a later date, "she deserved it." Defendant's evidence at trial showed that the wife ran off with another man and left him at home trying to work and take care of their six children.

Taught me that jurors will go outside Instructions; and having eyewitnesses does not guarantee a conviction.

[H. Dean Whipple]

Laclede County Circuit Court

State of Missouri,	]	
	]	
Plaintiff,	]	
	]	
vs.	]	No. 1792
	]	
Don Fullington,	]	
	]	
Defendant.	]	

Dean Whipple
Prosecuting Attorney

David Donnelly
Counsel for Defendant
112 North Madison
P.O. Box D
Lebanon, Missouri 65536
(417) 532-3177

Trial Date: February 7, 1968

Location: Lebanon, Missouri

Trial Judge: Judge Leroy Snodgrass [Deceased]

Summary: Prosecuted Defendant for the crime of robbery. Case was tried to a jury and Defendant was found guilty and sentenced to three years in the Missouri Department of Corrections.

Significance: Did investigation and prepared the case for trial. This was the first robbery case I tried and was not a strong case. Taught me to try cases even if evidence was not overwhelming.

Defendant did not appeal.

[H. Dean Whipple]

Laclede County Circuit Court

State of Missouri,]
]
Plaintiff,]
]
vs.] No. 1860
]
Carl Abe Brown,]
]
Defendant.]

Dean Whipple
Prosecuting Attorney

Orville Winchell [Deceased]
Counsel for Defendant

Trial Date: February 8, 1971

Location: Lebanon, Missouri

Trial Judge: Judge Leroy Snodgrass [Deceased]

Summary: Prosecuted Defendant for stealing a color television out of a motel room he had rented for the night. I did the bulk of the investigation and did the trial preparation and trial presentation. The evidence was all circumstantial. The jury convicted Defendant and assessed his punishment at four years confinement in the Missouri Department of Corrections.

On appeal the Missouri Supreme Court reversed, stating the circumstantial evidence was insufficient to sustain the conviction.

Significance: The evidence was meticulously presented to the jury to show the Defendant's sole possession of the room but the Supreme Court would not let the conviction stand.

During the last two years as Prosecutor I became adept at trying criminal jury cases and never lost a case, except this one, on appeal.

Conviction overturned - 462 S.W.2d 766 (Mo. 1971)

[H. Dean Whipple]

Laclede County Circuit Court

State of Missouri, Plaintiff,	]	
vs.	]	No. 2096
William O. Burns, Defendant.	]	

Darrell Deputy, Jr.
Prosecuting Attorney
145 East Second Street
P.O. Box 689
Lebanon, Missouri 65536
(417) 532-2191

Dean Whipple
Counsel for Defendant

Guilty Plea: July 14, 1972

Location: Lebanon, Missouri

Trial Judge: Judge Leroy Snodgrass [Deceased]

Summary: Defendant was charged with second degree murder. Represented Defendant at the preliminary hearing where he was bound over to stand trial. Continued investigating the case personally and found two witnesses who were in their home the night of the shooting who would testify that the victim had come to their front door carrying a shotgun and asked for Bill Burns (Defendant) and told the witnesses if she found Burns she was going to kill him. With this evidence I was able to negotiate a plea to manslaughter and obtain probation for Defendant.

Significance: An attorney should conduct his own investigation and not rely on police reports or evidence presented at preliminary hearing.

[H. Dean Whipple]

Laclede County Circuit Court

State of Missouri,]
]
Plaintiff,]
]
vs.] No. 1918
]
Robert Gross,]
]
Defendant.]

Charles Wesley
Prosecuting Attorney
P.O. Box 412
Waynesville, Missouri 65583
(314) 774-5544

Dean Whipple
Counsel for Defendant

Trial Date: October 31, 1972

Location: Lebanon, Missouri

Trial Judge: Judge Leroy Snodgrass [Deceased]

Summary: I represented Defendant who was charged and tried with armed robbery in Pulaski County, Missouri. The case came to Laclede County, Missouri, Circuit Court on a change of venue.

Mr. Claude Wood represented Defendant until the case came to Laclede County then I took over and did the investigative work and trial preparation.

Defendant was tried, convicted and received a ten-year sentence.

Significance: Defendant robbed a pawn shop in the presence of the owner and one employee.

The range of punishment for armed robbery in Missouri is ten years to life. With eyewitnesses I was able to get Defendant the minimum sentence.

Defense strategy: Attacked search of Defendant and how lineup identification was conducted by Military Police.

Defendant did not appeal.

[H. Dean Whipple]

Dallas County Circuit Court

State of Missouri, Plaintiff,	]	
vs.	]	No. 5695
Stanley A. Williams, Defendant.	]	

William L. Hauck
Prosecuting Attorney
Suite 200
1736 East Sunshine Street
P.O. Box 3737
Springfield, Missouri 65808
(417) 883-7411

Dean Whipple
Counsel for Defendant

Trial Date: August 6, 1973

Location: Buffalo, Missouri

Trial Judge: Judge Charles V. Barker
Polk County Courthouse
Bolivar, Missouri 65613
(417) 326-5317

Summary: I represented Defendant at the preliminary hearing and jury trial on the charge of armed robbery.

The judge declared a mistrial when the jury could not agree on a verdict.

Significance: The Defendant had an alibi that should have allowed the jury to find Defendant not guilty. I found out later the jury was deadlocked at 11-1 for acquittal.

On February 20, 1975, the State dismissed the charge and the case was closed.

[H. Dean Whipple]

Pulaski County Circuit Court

Richard J. Cade, Plaintiff,	]	
vs.	]	No. 8741
Mid-Continent Freight, Inc., Defendant.	]	

Dean Whipple
Counsel for Plaintiff

Dale Close
Co-Counsel for Plaintiff
3698 Sugar Hill Street
Springfield, Missouri
(417) 883-4073

R.B. Turley
Counsel for Defendant
(Now Associate Circuit Judge)
Phelps County Courthouse
P.O. Box 1550
Rolla, Missouri 65401
(314) 364-1891

Trial Date: January 10, 1972

Location: Waynesville, Missouri

Trial Judge: Judge Emery Allison [Deceased]

Summary: A personal injury case tried to a jury. Dale Close and I represented Plaintiff after taking the case over from another attorney when he retired. We prepared the case for trial and tried the case.

Significance: Gained trial experience in the trial of personal injury cases.

Verdict was for Plaintiff in the amount of ten thousand dollars.

Case was not appealed.

[H. Dean Whipple]

Camden County Circuit Court

Jack William Smith,	]	
	]	
Petitioner,	]	
	]	
vs.	]	No. 5020
	]	
Linda L. Smith,	]	
	]	
Respondent.	]	

Fred Foster, Jr. Counsel for Petitioner 27 Camden Court P.O. Box 457 Camdenton, Missouri 65020 (314) 346-2059	Dean Whipple Counsel for Respondent James Roach -- [Deceased] Co-Counsel for Respondent

Trial Date: April 26, 1973

Location: Camdenton, Missouri

Trial Judge: Judge Leroy Snodgrass [Deceased]

Judge Charles V. Barker -- [Judge assigned to retry the case from the transcript.]
Polk County Courthouse
Bolivar, Missouri 65613
(417) 326-5317

Summary: A bitterly contested divorce case with the primary issue being custody of the parties' eighteen-month-old son.

The case was tried April 26, 1973, and taken under advisement by the trial judge, Judge Leroy Snodgrass. Judge Snodgrass died with the case under advisement.

Judge Charles V. Barker of the 30th Circuit was assigned to take the case and with agreement of counsel he tried the case by reading the trial transcript. The Judge awarded custody to the mother and the father then fled the state with the child. The child and father had not been found when I ceased representing the mother.

Significance: It gave me an education on the viciousness and bitterness that is generated in child custody cases. I became aware of the inadequacy of the laws in existence at that time to try and obtain assistance from any law enforcement agencies to locate a child taken in violation of a judgment of a court.

Case was not appealed.

[H. Dean Whipple]

Laclede County Circuit Court

State of Missouri Highway Commission, Plaintiff,	]	
vs.	]	No. 7268
Tom and Ethel Batterton, Defendants.	]	

Thomas Cheatham
Counsel for Plaintiff
Route 3
Warrensburg, Missouri 64093
(816) 747-8181

Dean Whipple
Counsel for Defendant

Claude T. Wood -- [Deceased]
Co-Counsel for Defendant

Trial Date: May 8, 1973

Location: Lebanon, Missouri

Trial Judge: Judge Leroy Snodgrass [Deceased]

Summary: A condemnation suit by Missouri State Highway Department.

I was lead counsel at the jury trial. Co-counsel Claude Wood prepared the case for trial.

Significance: Gained experience in trying condemnation of property cases under the guidance of co-counsel Claude Wood, an elderly attorney who I tried cases with quite often the last three years I practiced law. Mr. Wood is now deceased.

Case was not appealed.

[H. Dean Whipple]

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I have been a state trial judge for twelve and one-half years and the significant legal activities I have pursued for that period of time have been my efforts to improve the efficiency of the courts, and the accessibility to the courts, in the five counties comprising the 26th Judicial Circuit of Missouri; and my work in The Missouri Bar as a member of the Board of Governors.

The Bar of Missouri is governed by thirty-three elected representatives from thirteen districts throughout the state who comprise the Board of Governors.

I was elected a representative of the Board of Governors in August, 1975 and have served since that time.

As a member of the Judiciary and a representative on the Board that governs the attorneys within the state I have been able to provide direct communication between the attorneys and the Judiciary which I feel has been beneficial to the improvement of the state legal system.

In the almost twelve years I have served on the Board of Governors the Board has had ongoing projects to improve the legal system and to make sure all individuals have access to the courts and representation by an attorney.

In 1975 The Missouri Bar spearheaded the drafting, passage and implementation of a new Judicial Article to the Missouri Constitution (Article V).

A special committee of The Missouri Bar drafted a proposed revision to the Judicial Article which was then presented to the Board of Governors. The Board of Governors completed the drafting of the proposed Judicial Article which served as the basis for the Judicial Article passed by the Missouri Legislature and submitted to the citizens for their approval and passage at a statewide election on August 3, 1976. I was active in the work by the Board of Governors from September, 1975 forward in the drafting and support of the Constitutional Amendment. With the implementation of the Judicial Article the courts of Missouri have much more flexibility in trial work and use of judicial personnel.

Other significant legal activities the Board of Governors of The Missouri Bar has undertaken or expanded which I have participated in during my time on the Board of Governors are as follows:

[H. Dean Whipple]

19. Legal Activities: (continued)

1978 -- Recodification of Missouri Criminal Code. The Bar worked on the recodification and passage by the Missouri Legislature. This recodification updated and modernized the Missouri Criminal Statutes.

1980 -- Instrumental in the recodification of Missouri Probate Code. This streamlined probate procedures for handling estates.

1982 -- Instrumental in passage of legislation to create a Public Defender Commission and expand public defender representation of indigent criminal defendants statewide. (Previously public defenders existed only in circuits which had a population of more than seventy-five thousand residents.)

Continued educational programs with the schools of the state and for the general public to improve public understanding of the law and our legal system.

1986 -- Mandatory Continuing Legal Education. The Board drafted and sent to the Missouri Supreme Court proposed rules which have been approved by the Court and implemented January 1, 1987.

I have been active in Bar committees and activities throughout my legal career. Please refer to Question 9 of this questionnaire for a complete list of my activities.

[H. Dean Whipple]

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Missouri State Employees' Retirement System.
As a Missouri Judge I have accumulated twelve and one-half years of service which would entitle me to draw retirement benefits when I turn seventy years old. This is a non-contributing retirement program. My retirement rights are vested. My wife has widow's benefits available if I die at any time. [See Sections 476.450 through 476.680 RSMo 1986.]

Missouri State Teachers' Retirement System.
My wife is an active teacher and has contributed to this retirement program for the past twenty-four years. She will continue to contribute as long as she teaches and when she accumulates thirty years of service, or turns sixty-five, she may retire and draw benefits. If she ceases teaching before accumulating thirty years of eligible service she may draw out her contributions or let them stay in until she turns sixty-five and then start drawing a retirement income. The present cash value of her account is thirty-five thousand seventy-seven dollars and seventy-three cents.

State of Missouri Deferred Compensation Plan.
In May, 1987, I began participating in this program, having signed up in April, 1987. Each month eight hundred dollars is withheld by payroll deduction and invested in Mass. Capital Development Fund. My participation will cease when I resign my present position. I may withdraw my contributions or allow them to remain until I turn seventy and one-half years old.

Missouri Holding and Investment Corporation.
This is a local corporation which started out as an investment club. There are nine stockholders, including myself. We had to liquidate all of our investments in the late 1970's when interest rates on notes reached 19%, except for one commercial building which had a fixed-rate ten-year mortgage. The building is leased and the corporation operates at a loss each year. The corporation is trying to sell the building and liquidate. I have never received any income from this corporation. I may receive some money when the building is sold.

Building Lease with Department of the Army.
I lease the first floor of the building I own at 118 West Commercial, Lebanon, Missouri, to the Department of the Army which is used by them for a recruiting office. They are in the first year of their second five-year lease. The rent is fixed for the term of the lease at two hundred fifty dollars per month and I pay all utilities. I do not see this as a conflict.

[H. Dean Whipple]

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will follow the recommendations of the Justice Department, Judicial Ethics Committee and Government Ethics Office to resolve any potential conflicts. I will sell the stock or establish a blind trust as directed by the Justice Department, Judicial Ethics Committee and Government Ethics Office.

I know of no categories of litigation or financial arrangements that would present potential conflicts of interest during my initial service on the Federal Bench. I have been a State Trial Judge for over twelve and one-half years and all potential conflicts from my private practice do not now exist.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria; and other items exceeding $500 or more. (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

[Please see following page - "A".]

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

[Please see following pages - "B", "C", "D" and "E".]

[H. Dean Whipple]

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria; and other items exceeding $500 or more. (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

	1987	1986
Salaries		
State of Missouri (H)	$ 42,137.50	$ 67,500.00
Lebanon R-3 School District (W)	$ 14,867.32	$ 21,173.10
Interest Earned		
Central Bank (H & W)	$ 24.31	$ 47.00
Safety Federal S/L	$ 1,589.39	$ 2,361.00
United S/L	$ 930.80	$ 1,240.00
IRA - (H)	$ 572.34	$ 1,154.93
IRA - (W)	$ 548.45	$ 1,112.06
David Atkinson (personal note)	$ 64.00	$ 186.00
Dividends Income		
CPC International	$ 74.40	$ 88.00
Sterling Drug	$ 147.15	$ 174.00
General Motors	$ 12.50	$ 25.00
Owens-Illinois (Sold 3-87)	$ 28.88	$ 99.00
Hamilton Fund	$ 12.33	$ 110.00
Other Income		
Sale of Owens-Illinois Stock	$ 6,897.00	$ --
Rental Income - I rent the first floor of the building at 118 West Commercial to the Department of the Army for the Army Recruiting Office.	$ 2,250.00	$ 3,000.00
Reimbursement for meals and mileage	$ 2,595.03	$ 4,629.00

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	99	192	18	Notes payable to banks—secured	NONE		
U.S. Government securities—add schedule	NONE			Notes payable to banks—unsecured	NONE		
Listed securities—add schedule	17	084	67	Notes payable to relatives	NONE		
Unlisted securities—add schedule	3	078	01	Notes payable to others	NONE		
Accounts and notes receivable:				Accounts and bills due		161	00
Due from relatives and friends		348	60	Unpaid income tax	NONE		
Due from others	NONE			Other unpaid tax and interest	NONE		
Doubtful	NONE			Real estate mortgages payable—add schedule	48	289	81
Real estate owned—add schedule	314	000	00	Chattel mortgages and other liens payable	NONE		
Real estate mortgages receivable	NONE			Other debts—itemize:	NONE		
Autos and other personal property	28	800	00				
Cash value—life insurance	NONE (All term)						
Other assets—itemize:	NONE						
				Total liabilities	48	450	81
				Net worth	414	052	65
Total assets	462	503	46	Total liabilities and net worth	462	503	46
CONTINGENT LIABILITIES				**GENERAL INFORMATION**			
As endorser, comaker or guarantor	NONE			Are any assets pledged? (Add schedule.)	No		
On leases or contracts	NONE			Are you defendant in any suits or legal actions?	Yes, in my capacity as Circuit Judge.		
Legal Claims	NONE			Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax	NONE						
Other special debt	NONE						

SCHEDULE A -- CASH ACCOUNTS

[H. Dean Whipple]

CHECKING ACCOUNTS

Boatmen's National Bank 104 North Jefferson Lebanon, Missouri 65536	(Husband) (High School Class of '56)	$ 1,014.81 $ 216.24
Central Bank 101 West Commercial Lebanon, Missouri 65536	(Joint)	$ 692.12
Commerce Bank 224 West Commercial Lebanon, Missouri 65536	(Joint)	$ 751.66

SAVINGS ACCOUNTS

United Savings and Loan 2nd and Jefferson Lebanon, Missouri 65536	(Joint) (Joint)	$ 18,938.95 $ 5,136.33
Central Bank 101 West Commercial Lebanon, Missouri 65536	(Joint) (High School Class of '59)	$ 423.21 $ 491.06
Safety Federal Savings & Loan 910 Grand Avenue Kansas City, Missouri 64106	(Joint)	$ 44,916.73

IRA ACCOUNTS

United Savings & Loan 2nd and Jefferson Lebanon, Missouri 65536	(Wife) (Husband)	$ 13,182.47 $ 13,428.60

SCHEDULE B -- SCHEDULE OF STOCKS, BONDS, AND OTHER INVESTMENTS

[H. Dean Whipple]

LISTED SECURITIES

General Motors - 5 shares common - (H & W) @ $88.75	$ 443.75
Sterling Drug - 135 shares common - (H & W) @ $61.875	$ 8,353.12
CPC Industries, Inc. - 80 shares common - (H & W) @ $55.375	$ 4,430.00
Mass. Capital Development Fund -- State of Missouri Deferred Compensation Plan 301 East High Street Jefferson City, Missouri	$ 3,200.00
Hamilton Fund P.O. Box 300 Denver, Colorado 80201	$ 657.80

UNLISTED SECURITIES

K.G. Manufacturing & Associates, Inc. - 200 shares common	$ 2,000.00
Missouri Holding and Investment - 75 shares common	$ 1,078.01

SCHEDULE C -- SCHEDULE OF REAL ESTATE OWNED

[H. Dean Whipple]

Description	Mortgagee	Amount Owed	Value
Home on 13.18 Acres -- Lot 1, Colonial Meadows Subdivision - Lebanon, Missouri	Harold Whipple 548 Chestnut Lebanon, Missouri	$ 11,676.68	$ 200,000.00
Office Building - 15' x 50' -- Part Lot 11, 1st Railroad Addition to Lebanon, Missouri	Doris Knight 350 South Adams Lebanon, Missouri	$ 7,500.00	$ 25,000.00
290 Acres in Section 34, Township 35, Range 18 (Dallas County, Missouri)	Harold Whipple 548 Chestnut Lebanon, Missouri	$ 29,113.13	$ 80,000.00
25.18 Acres in Section 10, Township 35, Range 14 (Laclede County, Missouri) - 1/3 owner with Dennis and Deanna Hite (brother-in-law and sister-in-law) and Edythe Miller (mother-in-law)	NONE	NONE	$ 8,000.00
1.50 Acres in Section 11, Township 35, Range 14 (Laclede County, Missouri) 1/2 owner with Dennis and Deanna Hite (brother-in-law and sister-in-law)	NONE	NONE	$ 1,300.00

[H. Dean Whipple]

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have been a candidate for political offices as follows:

Candidate for Laclede County, Missouri. Prosecuting Attorney, 1966, 1968 and 1970. -- Elected and served, January, 1967 through June, 1971.

Candidate for Republican Laclede County Committeeman, 1970 and 1972. -- Elected and served as committeeman and county chairman, January, 1970 through December, 1974.

Candidate for City Attorney of Lebanon, Missouri, 1972. Was not elected.

In addition to being Republican County Chairman I also served as County Chairman for Christopher Bond's campaign for State Auditor. This was from February, 1970 through November, 1970. My responsibilities were to coordinate the county campaign for Bond with his state campaign and to obtain volunteers to campaign for Bond in Laclede County.

In 1972 I was District Chairman over five counties in Christopher Bond's campaign for Governor of Missouri. This was from January, 1972 through the General Election in November, 1972. My responsibilities were to coordinate the county chairmen's campaigns in each county in my district with the state campaign.

In the general election of November, 1974, I was elected (unopposed) to the position of Circuit Judge. This term of office began on January 6, 1975 and expired December of 1980.

In the general election of November, 1980, I was reelected (unopposed) to the same position for another six-year term and assumed that position in January, 1981.

In the general election of November, 1986, I was reelected (unopposed) to the same position for another six-year term and assumed that position in January, 1987. I run for Circuit Judge on a partisan ticket (Republican).

By Missouri Supreme Court Rule 2, Code of Judicial Conduct, Canon 7, I can only attend party functions and contribute to the political party of my choice. I am prohibited from serving on a party committee, acting as a party leader, and cannot solicit contributions to party funds.

I abide by this Code without exception and have done so since first being elected Circuit Judge. I have held no office with a political party since becoming Circuit Judge, January 6, 1975.

[H. Dean Whipple]

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

From May 1, 1965, until I became Prosecuting Attorney January 1, 1967, I was appointed by the courts to defend individuals charged with criminal offenses.

All of the practicing attorneys in rural Missouri were subject to receiving criminal case appointments as Missouri did not have a public defender system until April 1, 1982.

I do not have records of the appointments I received; my best estimate would be 20-30 cases.

On January 1, 1967, I became Prosecuting Attorney for Laclede County, Missouri, and served in that capacity until June 15, 1971. In this position my pro bono work was for individuals who would come to the Prosecutor's Office seeking advice on matters they thought the Prosecutor could handle. I would counsel with them and identify their problem and, if it was not a criminal matter, I would so advise them and explain to them why they needed an attorney to represent them. I would estimate this type of counseling involved two to three hours each week for the four and one-half years I was in that office.

Upon returning to private practice in June, 1971, I again began receiving court appointments to represent criminal defendants. This continued until I became Circuit Judge in January, 1975. I can only estimate the number of criminal defendants I represented during this period as I did not keep separate indexes on my criminal clients because they were all represented equally. I would estimate that I represented 40-50 individuals on pro bono criminal matters during this period.

I would also represent individuals on civil matters which were not started as pro bono matters but turned out that way because of the client's inability or failure to pay. When I terminated my private practice I had unpaid fees of approximately $12,000.00 which I simply considered as pro bono work.

After becoming a Judge I could not do pro bono work because of the Missouri Rules of Judicial Conduct but I did, and still continue to fulfill, my belief and responsibilty that every individual who appears before me has legal representation. If they do not have an attorney I advise them how they can obtain an attorney through Legal Aid or appoint a public defender to represent them.

[H. Dean Whipple]

1. (continued)

From 1982 through 1984, under the State Public Defender Law, in rural Missouri private attorneys were appointed to represent indigent defendants. The other Circuit Judge who serves the 26th Circuit and I devised a points system to equally distribute the workload of the private attorneys who we appointed to represent indigent defendants.

Project Misdemeanant

In 1971 a group of people organized a volunteer organization called Project Misdemeanant. It was formed to fill a need of providing adult counselors on a one-on-one basis for juveniles who were in the juvenile court system because of delinquency, truancy and/or behavior problems. The Juvenile Court would refer the juvenile to Project Misdemeanant who would assign a trained volunteer to be a big brother or sister to the juvenile. The volunteer was expected to spend a minimum of one hour a week with the juvenile.

Project Misdemeanant was recognized nationally for its work by receiving the Valley Forge Liberty Bell Award in 1976.

I was one of the organizing individuals of the organization, took the necessary training to be a qualified volunteer and was assigned one juvenile for a period of six months before I became a Judge and could no longer work as a volunteer. I remained active in the program until it ceased to be used due to changes in State Laws prescribing the way status offenders were to be handled.

Client Security Committee

On October 22, 1986, I was appointed to the Client Security Committee of The Missouri Bar as Board Liaison. This Committee considers claims by individuals for recovery of money they lost because of wrongful acts of their attorneys. Claims are considered and evaluated and after the attorney is disciplined or disbarred the Committee can recommend to the Board of Governors to pay part or all of each claim from funds of The Missouri Bar. I have attended two meetings of the Committee and spent approximately five hours office time on Committee work.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I do not now belong to any organization that discriminates against individuals.

I did belong to the Lebanon, Missouri Jaycees (1965-1973) and to the Lebanon, Missouri Rotary Club (1965-1974) who both excluded women from membership.

[H. Dean Whipple]

2. (continued)

While a member of the Jaycees our chapter had a very active Jaycees Wives organization who participated with us in all of our civic and social functions except our monthly business meeting. During that period of time it never entered our minds that excluding the wives or women from full membership was discriminatory.

While a member of the Rotary Club it was considered a businessman's civic organization and likewise the lack of women members was not an issue that ever arose. I resigned shortly before becoming a Judge to avoid any conflict in cases where Rotary Club members were litigants.

The issue was never raised or considered while I belonged to these clubs.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

Yes.

If so, did it recommend your nomination?

Yes.

Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Since Senator John Danforth became a member of the U.S. Senate in 1976 every time there has been a vacancy on the Federal Bench he has filled the vacancy by establishing a Merit Selection Commission to solicit applicants, interview them and submit a panel of three candidates to the Senator for his final selection to be nominated to fill the position.

A completely new Merit Commission is established for each vacancy. The Missouri Bar names two members, the Deans of the Law Schools within the Judicial District name a member and Senator Danforth names two members. Beginning in 1987 Senator Christopher Bond now participates in this merit selection process and he named two members to the present Commission, making it a seven-person Commission.

Once the Commission is created the Senators have no further input as to how the Commission operates to make their three selections.

The present Commission, upon being organized in April, 1987, requested The Missouri Bar Office send notices to all of the attorneys in the U.S. District Court - Western District advising them of the vacancy and what procedure to follow in order to apply for the position.

I sent for, received, filled out and returned an application to the Commission.

[H. Dean Whipple]

3. (continued)

On May 13, 14 and 15, 1987 the Commission, sitting en banc, interviewed thirty-seven applicants. I appeared before the Commission on May 14, 1987.

The Commission then submitted a panel of three individuals to the Senators. I was one of the three on the panel and was subsequently selected by the Senators as their nominee to President Reagan and the U.S. Senate.

Senator Danforth has used the Merit Selection Process to fill vacancies on the U.S. District Court - Western District Bench on two previous occasions, March, 1981 and May, 1982. I was named by each Merit Commission to the respective panels they submitted to Senator Danforth.

4. has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal Judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The Federal Courts are courts of limited jurisdiction and have only those powers given to them by the United States Constitution, and as further defined by Congress.

A Federal Judge should try cases involving actual controversies between real parties in interest.

[H. Dean Whipple]

5. (continued)

The issues should be clarified and defined for trial and the trial conducted on the evidence relevant to the issues. The trial judge should approach each case with an open mind to fairly and impartially hear the evidence and the counsels' arguments on the legal issues.

After hearing all the evidence the Court should apply the law applicable to the case as given to him by the Constitution, by Congress and any appropriate state laws and render the Court's decision in a prompt and precise manner.

I agree with the concept of separation of powers and do not feel it is the trial court's place to attempt to legislate by its decisions. The trial court should respect the Legislature's rights to draft and create the laws they feel should be enacted to give the desired results, controls, social policy or reformation.

AFFIDAVIT

I, HAROLD "DEAN" WHIPPLE, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Sept. 21, 1987 Harold Dean Whipple

H. Dean Whipple

Debra L. Stenzinger

(Notary)

ATTACHMENT I

Following is a list of the cases attached and a notation whether they were appealed or not.

PAIGE TEDFORD MANARD vs. STATE OF MISSOURI	]]]	Affirmed on Appeal 731 S.W.2d 58
THERESA C. MORRIS vs. GEORGE C. MORRIS	]]]	Affirmed on Appeal 726 S.W.2d 505
ROGER ROY NOLAN vs. STATE OF MISSOURI	]]]	Appellate Opinion #14937 (Affirmed 7-30-87)
CAROUSEL INTERNATIONAL CORP. vs. MISSOURI DEPARTMENT OF REVENUE	]]]	Not Appealed
STATE OF MISSOURI, ex rel. PUBLIC DEFENDER COMMISSION vs. COUNTY COURT OF GREENE COUNTY	]]]]	Reversed on Appeal 667 S.W.2d 409
JOHN J. BOSWELL vs. MISSOURI STATE HIGHWAY COMMISSION	]]]]	Not Appealed
COMMERCE BANK OF LEBANON vs. HALLADALE A CORPORATION	]]]	Affirmed on Appeal 618 S.W.2d 298
JAMES WILSON CHAMBERS vs. STATE OF MISSOURI	]]]	Affirmed on Appeal 623 S.W.2d 76
WILBY A. RICE and BONNIE RICE vs. ROBERT W. PLASTER	]]]	Not Appealed
A. OVERTON DURRETT vs. LAKELAND STATE BANK, et al.	]]]	Not Appealed

On January 1, 1986, the Missouri Supreme Court changed pleading requirements to 8-1/2 x 11 paper. The first three opinions reflect this change.

AMERICAN BAR ASSOCIATION Standing Committee on Federal Judiciary
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

CHAIRMAN
Harold R. Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112
FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101
SECOND CIRCUIT
William E. Willis
125 Broad Street
New York, NY 10004
THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103
FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
rel St. Paul's Boulevard
Norfolk, VA 23510
FIFTH CIRCUIT
Lloyd Lochridge
Suite 1300
919 Congress Avenue
Austin, TX 78701
SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215
SEVENTH CIRCUIT
Joan M. Hall
Suite 4300
One IBM Plaza
Chicago, IL 60611
EIGHTH CIRCUIT
James W. Hewitt
Post Office Box 80268
1815 Y Street
Lincoln, NE 68501
NINTH CIRCUIT
J. David Andrews
1900 Washington Building
Seattle, WA 98101
Samuel L. Williams
45th Floor
355 South Grand Avenue
Los Angeles, CA 90071
TENTH CIRCUIT
James A. Clark
Suite 1300
303 East 17th Avenue
Denver, CO 80203
ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Post Office Box 78
2 Dexter Avenue
Montgomery, AL 36101
DISTRICT OF COLUMBIA CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 I Street, NW
Washington, DC 20006
FEDERAL CIRCUIT
John D. Lane
Suite 600
1666 K Street, NW
Washington, DC 20006
BOARD OF GOVERNORS LIAISON
Sharp Whitmore
2005 Gird Road
Fallbrook, CA 92028
STAFF LIAISON
Irene R. Emsellem
2nd Floor, South Lobby
1800 M Street, NW
Washington, DC 20036
(202) 331-2210
ABA/NET: ABA 461

September 30, 19

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: HAROLD DEAN WHIPPLE
United States District Court
for the Western District of Missouri

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Harold Dean Whipple for appointment as Judge of the United States District Court for the Western District of Missouri.

Our Committee is unanimously of the opinion that Judge Whipple is "Qualified" for this appointment.

Sincerely yours,

Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

EDWARD F. HARRINGTON

Birth:	September 15, 1933	Fall River, Massachusetts
Legal Residence:	Massachusetts	
Marital Status:	Married	Ellen Erisman Harrington 6 children
Education:	1951 - 1955	College of the Holy Cross A.B. degree
	1957 - 1960	Boston College Law School J.D. degree
Bar:	1960	Massachusetts
Military Service:	1955 - 1957	United States Navy Lieutenant Junior Grade
Experience:	1960 - 1961	Law Clerk to Hon. Paul Reardon Massachusetts Superior Court
	1961	Law Office of Paul T. Smith Associate
	1961 - 1965	U. S. Department of Justice Criminal Division Special Trial Attorney
	1965 - 1969	Assistant U. S. Attorney District of Massachusetts
	1969	Law Office of Melvin Louison Associate
	1969 - 1973	U.S.Department of Justice Organized Crime Strike Force Deputy Attorney-in-Charge (1969-1970) Attorney-in-Charge (1970-1973)
	1973 - 1975	Peloquin, McKeon & Reilly Associate
	1975 - 1977	Gargan, Harrington & Markham Partner
	1977 - 1981	United States Attorney District of Massachusetts
	1981 - present	Sheridan, Garrahan & Lander Of Counsel
Office:	The Meadows 161 Worchester Road (P.O. Box 867) Framingham, Massachusetts 01701 617 879-5700	
Home:	732 Great Plain Avenue Needham, Massachusetts 02192	

1. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

   Edward Francis Harrington

2. Address: List current place of residence and office address(es).

   Home address:

   732 Great Plain Avenue
   Needham, MA 02192

   Office address:

   Sheridan, Garrahan & Lander
   The Meadows
   161 Worcester Road - P.O. Box 867
   Framingham, MA 01701

3. Date and place of birth.

   September 16, 1933, at Fall River, MA.

4. Marital Status (include maiden name of wife). List spouse's occupation, employer's name and business address(es).

   Married. Ellen Mary Harrington (Erisman), housewife.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   College of the Holy Cross, Worcester, MA, September, 1951 - June, 1955, A.B. Degree, in Honors Course cum laude, member of N.R.O.T.C., June 8, 1955.

   Boston College Law School, Brighton, MA, September, 1957 - June, 1960, J.D. Degree, June 13, 1960, Dean's List, third in class - second year, ninth in class - three-year cumulative average, Jacket Editor, Annual Survey of Massachusetts Law, member of and contributor to the Law Review, awarded American Jurisprudence Prize for Highest Grade in Evidence, 1958 - 1959.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

   Please refer to answers to questions #8 (Military Service), and #17 (Legal Career).

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

   Ltjg., Active Duty, U.S. Navy, July 2, 1955 - June 30, 1957; Lieutenant, Inactive Duty, U.S. Naval Reserve, 1957 - 1972, serial number 548160, honorable discharge.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Consultant, National Commission on the Review of the National Policy Toward Gambling, November, 1974 - December, 1976.

Advisor, National Commission on Violence, June, 1968 - September, 1969.

Letter of Commendation from J. Edgar Hoover, F.B.I. Director, March 12, 1968, for performance in trial of Raymond L. Patriarca et al.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association
Massachusetts Bar Association
South Middlesex Bar Association

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong (such as civic, educational "public interest" law, etc.)

Member, Saint Joseph's Parish Council, 1975-1977.

Board of Directors, Massachusetts Committee Against Child Abuse, 1979-1981.

Board of Directors, Charitable Irish Society, 1985-1986.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses, if any such membership lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Judicial Court of Massachusetts, November 16, 1960.

United States District Court for District of Massachusetts, April 5, 1965.

Court of Appeals for the First Circuit, September 13, 1965.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I wrote "Effect of Exculpatory Language on Illegal Union Security Provisions," Boston College Industrial and Commercial Law Review, Spring, 1960, and "Organized Crime - A Prosecutive Program," The Advocate of Suffolk University Law School, Spring, 1974.

I lectured at the Boston College University Law School 50th Anniversary Forum on Professional Responsibility, 1979, and delivered the Law Day Address before the Worcester County Bar Association, 1981.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent.

January 2, 1987. Arthur R. Kennedy, Jr., M.D., 200 Washington Street, Newton, MA.

14. Judicial Office:

Not applicable.

15. Citations:

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Attorney-in-Charge, United States Department of Justice's "Strike Force" Against Organized Crime. October 16, 1970 - March 31, 1973. Appointed by Attorney General Mitchell.

Chairman, Alcoholic Beverages Control Commission. April 14, 1975 - January 1, 1977. Appointed by Governor Michael Dukakis. It is a three-person administrative body authorized to enforce the state liquor laws.

United States Attorney for Massachusetts. August 1, 1977 - November 1, 1981. Appointed by President Carter.

Member of U.S. Attorney General's Advisory Committee of United States Attorneys, August, 1977 - January, 1980; Secretary, March, 1978 - March, 1979. Appointed by Attorney General Bell.

Candidate for Democratic Party's nomination for Attorney General of Massachusetts, September 10, 1974.

Nominee of the Republican Party for Attorney General of Massachusetts, November 4, 1986.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school:

Law Clerk to the Honorable Paul C. Reardon, Chief Justice, Massachusetts Superior Court, July, 1960 to September, 1961.

An associate in the offices of Attorney Paul T. Smith, 209 Washington Street, Boston, MA, September, 1961 to November, 1961.

Special Trial Attorney, Criminal Division, United States Department of Justice, November, 1961 to March, 1965 - specialized in the trial and appeal of criminal cases in federal courts; chosen by Attorney General Robert Kennedy to be a member of his special prosecutive group involved in the investigation and prosecution of labor racketeering throughout the United States; sent to Mississippi in the Summer of 1964 by Attorney General Robert Kennedy as a part of a select unit to represent the federal government in the promotion of civil order to protect civil rights volunteers in their conducting of "Freedom Schools"; represented the Criminal Division in conducting the investigation into the facts surrounding the murders of three civil rights volunteers in Philadelphia, Mississippi, in 1964.

Assistant United States Attorney for Massachusetts, March, 1965 to January, 1969 - involved in the trial and appeal of federal criminal and civil cases in the District of Massachusetts; tried cases in the categories of federal tort claims, income tax evasion, selective service and organized crime; involved in the prosecution and successfully argued the appeal in the case of United States v. Raymond L. Patriarca.

An associate in the offices of Attorney Melvin Louison, Taunton Green, Taunton, Mass., February 1969 to May 1969.

Deputy Attorney-In-Charge, United States Department of Justice Organized Crime Strike Force for New England Area, May 1969 to October, 1970.

Attorney-In-Charge, United States Department of Justice Organized Crime Strike Force for New England Area, October, 1970, to March, 1973 - chief trial and appellate lawyer handling organized crime cases in the federal courts in the New England states; successfully prosecuted Ilario Zannino, Dennis Raimondi, Jack Mace, and others; assisted in the development of such important government witnesses as John J. Kelley and Vincent C. Teresa; formulated the investigative program for the efforts of the federal government against organized crime in the New England region.

An associate in the Washington firm of Peloquin, McKeon & Reilly with offices in Boston, MA, April 1973 to January 1975.

Partner in the Boston law firm of Gargan, Harrington & Markham, January 1975 to August 1, 1977.

United States Attorney for Massachusetts, August 1, 1977 to November 1, 1981. Emphasized an investigative program against corruption in government, which resulted in the prosecution and conviction of corrupt public officials from federal agencies, such as C.E.T.A. and S.B.A.; from state government, including the state senate, the attorney general's office, and the A.B.C.C.; and from local government, including the City of Boston and City of Fall River.

Of Counsel, Law Firm of Sheridan, Garrahan & Lander, The Meadows, 161 Worcester Road, Framingham, MA, since November 1, 1981.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

1961 - 1973: as a trial attorney in various capacities in the Justice Department, such as Special Attorney, Assistant United States Attorney, and Attorney-in-Charge, Organized Crime "Strike Force" for New England area, I prosecuted numerous criminal cases and tried many tort cases on behalf of the United States.

1973 - 1977: engaged in private practice in two small law firms in the general practice of law, concentrating in litigation.

1977 - 1981: United States Attorney for Massacnusetts. I supervized an office of approximately 40 attorneys, developed policy, dealt with other government agencies, and personally engaged in limited trial practice.

1981 - Present: engaged in private practice in a 17 person law firm in general practice of law, concentrating in litigation in both the criminal and civil areas.

2. Describe your typical clients, and mention the areas, if any, in which you have specialized.

My typical clients today are individuals and corporations involved in civil, criminal, and administrative controversies. My specialty is trial practice. During my twenty-six years as an attorney, my principal client has been the United States of America. For approximately sixteen years, I have represented

the Government in capacities ranging from Trial Attorney and Assistant U.S. Attorney to United States Attorney for Massachusetts. I have handled for the Government a wide range of cases, both criminal and civil, including the areas of organized crime, public corruption, labor racketeering, civil rights, income tax and torts. These cases have ranged in complexity from the simple tort case to the complex income tax case.

In the decade I have spent in private practice outside government, I have handled both criminal defense work and commercial civil litigation. My criminal clients have included numerous court appointments, and I have been on the Capital List for murder cases, receiving approximately three appointments to such cases. I have also been retained to defend non-indigent clients in criminal cases. I have acted as defense attorney in criminal trials in both federal and state courts. In the civil context, I have represented corporate clients in a variety of matters ranging from zoning to racial discrimination. I have handled civil matters both in courts and before administrative agencies. Some of my corporate clients have been Framingham Union Hospital (trial and appeal of zoning case); Framingham Trust Company (trial of will case); A.J. Lane Co. (settlement of eviction case); The Flatley Co. (settlement of water damage case); Paramount Development Corporation, a subsidiary of Perini Corp. (settlement of a boundary case); Houlihan's (hearing on liquor license application); Bennigan's (hearing on liquor license application); Belz Construction Co. (investigation of alleged racial discrimination by Mass. Comm. Against Discrimination); Rainbow, Inc. (investigation of alleged customs violation by U.S. Customs).

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each variance, giving dates.

I am in court quite frequently, at least on pre-trial matters. During the year 1986, I did not appear as often in court, as I was involved in a state-wide campaign for the office of Attorney General of Massachusetts. I was the unopposed nominee of the Republican Party for that position.

Appearances in court were very frequent during the period 1961-1973 when I was a prosecutor for the United States, less frequent during the period 1977-1981 when I held the administrative post of United States Attorney.

2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

   (a) 65%
   (b) 35%
   (c) 0%

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

   (a) 50%
   (b) 50%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

1981 - Two: United States District Court, Massachusetts, (chief counsel)

1982 - Ten: Middlesex Superior Court, Framingham District Court, Worcester District Court, Natick District Court, East Boston District Court (sole counsel)

1983 - Two: Middlesex Superior Court, (sole counsel)

1984 - Four: Hingham District Court, Lawrence District Court, Dedham District Court, Natick District Court, (sole counsel)

1985 - Two: Worcester Superior Court, Framingham District Court, (sole counsel)

1986 - One: Suffolk Superior Court, (associate counsel)

1987 - Three Middlesex Superior Court; Framingham District Court (sole counsel)

5. What percentage of these trials was:
(a) Jury;
(b) non-jury.

(a) 30%
(b) 70%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citation, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties..

In Re Atterbury, 316 F.2d 106 (6th Cir., 1963)

This case was an action for criminal and civil contempt arising out of a grand jury investigation conducted by the Justice Department in the Western District of Kentucky at Louisville. The probe was directed at the alleged illegal flow of union funds from the International Brotherhood of Teamsters through the Kentucky State Conference of Teamsters. Atterbury, the Secretary of the State Conference, refused to identify records of the State Conference previously produced by him before the grand jury on the ground of his Fifth Amendment privilege. Atterbury was held in contempt by District Judge Henry Brooks and placed under arrest to be held in custody for a year and a day. The sentence was to be modified if he came before the Court within 60 days and answered the questions. The order of contempt was affirmed by the Court of Appeals for the Sixth Circuit, and Atterbury subsequently identified the records before the grand jury.

As a Special Trial Attorney, United States Department of Justice, I assisted U.S. Attorney William E. Scent in conducting the grand jury proceedings extending over a period of many months during 1963.

I drafted both appellate briefs and orally argued the second (and unreported) appeal before the Sixth Circuit.

Prior to the enactment of the Federal Transactional Immunity Statute in 1968 and the Use Immunity Statute in 1970, the invocation of a witness's Fifth Amendment privilige would virtually stymie a grand jury investigation. Atterbury is an example of the then limited area of interrogation available in which the Fifth Amendment did not apply, namely, to the production of corporate records in a representational capacity. Atterbury clarified that the Fifth Amendment privilige is inapplicable to the production of such records, but also to their identification, which is implicit in the very concept of production.

William E. Scent presently practices law in Paducah, KY. The witness Atterbury was represented by Attorney Jacques Schiffer, who was retained by the International Brotherhood of Teamsters. My associate as a Special Attorney was Robert D. Peloquin, presently an attorney in Rockville, Maryland.

Robert D. Peloquin
6110 Executive Boulevard
Suite 250
Rockville, Maryland 20852
Tel: (202) 452-8555

William E. Scent
Scent and Scent
P.S.C. P.O. Box 1095
Paducah, KY 42001
Tel: (502) 442-3223

McGarry v. United States, 388 F.2d 862 (1st. Cir., 1967).
cert. denied 394 U.S. 921 (1969)

Appellant McGarry was indicted in the United States District Court for the District of Massachusetts on three counts of income tax evasion. The case was tried to a sequestered jury before District Judge Caffrey. After a trial lasting twenty-one days, appellant was found guilty on all three counts on March 30, 1967 and was sentenced to imprisonment for five years and fined $30,000. The case was prosecuted under the "net worth and expenditures" theory of proof.

As an Assistant United States Attorney, I co-tried the case with chief trial counsel Eldon Hawley of the Criminal Section, Tax Division, U.S. Department of Justice. I prepared the appellate brief and successfully argued the appeal against Washington attorney Edward Bennett Williams.

Appellant McGarry was represented at trial by attorney Lawrence F. O'Donnell

The McGarry investigation and trial became one of the most publicized criminal tax cases of its day in Massachusetts and is an example of the United States Government's use of the tax statutes to provide a jurisdictional basis to conduct criminal investigations against alleged organized crime figures. The case also presents an excellent analysis of the "net worth" theory of proof.

Lawrence F. O'Donnell
1147 Hancock Street
Quincy, Mass. 02169
Tel: (617) 770-0770

Edward Bennett Williams
839 17th St. N.W.
Washington, D.C. 20006
Tel: (202) 331-5000

Eldon Hawley
Tax Division
U.S. Department of Justice
Penn and 10th Street N.W.
Washington, D.C. 20530
Tel: (202) 633-2973
(Retired)

Patriarca v. United States, 402 F.2d 314 (1st Cir., 1968); cert. denied 393 U.S. 1022 (1969)

Alleged organized crime leader Raymond L.S. Patriarca and two associates, Henry Tameleo and Ronald Cassesso, were indicted in a three count indictment charging a conspiracy and two substantive violations of the Travel Act, 18, United States Code § 1952 (a) (2). The case was tried to a sequestered jury before District Judge Ford in the District of Massachusetts commencing on March 4, 1968. After a five day trial, all defendants were found guilty.

Each defendant was sentenced to a five year term of imprisonment and fined $10,000.

As an Assistant United States Attorney, I assisted United States Attorney Paul F. Markham in the trial of the case, substantially prepared the appellate brief with assistance from Special Attorney Walter T. Barnes, Criminal Division, U.S. Department of Justice, and successfully argued the appeal before the First Circuit Court of Appeals.

Attorney Charles A. Curran of Providence, R.I. represented defendant Patriarca, Attorney Ronald J. Chisholm, of Boston, Mass., represented defendant Cassesso and Attorney Joseph J. Balliro of Boston, Mass., represented defendant Tameleo.

The case represented the first successful use of the testimony of an accomplice witness, one Joseph Baron, to convict a major syndicate figure in this area of the country. The conviction of Patriarca, the alleged leader of organized crime in New England, was the first inroad made by the federal government in the drive against the organized underworld in the region.

The development of Baron as an accomplice witness made clear to other potential informants that they could turn state's evidence and not fear reprisal. John J. "Red" Kelley and Vincent C. Teresa were subsequently developed by the Justice Department as witnesses as a direct result of Baron's defection from the underworld.

The security problems attendant to the protection of Baron laid the foundation for the Witness Protection Program later formally established under the provisions of the Organized Crime Control Act of 1970.

Paul F. Markham
50 Congress Street
Boston, Mass. 02109
Tel: (617) 742-4150

Ronald J. Chisholm
1 Center Plaza
Boston, Mass. 02108
Tel: (617) 742-6050

Walter J. Barnes
9005 Beatty Drive
Alexandria, Virginia 22308
Tel: (703) 780-2442

Joseph J. Balliro
3 Arlington Street
Boston, Mass. 02116
Tel: (617) 227-5822

United States v. Strauss, 443 F. 2d. 986 (1st Cir., 1971); cert. denied 404 U.S. 851 (1971)

Four defendants, including alleged organized crime leaders Ilario Zannino and Peter Limone, as well as Lewis Strauss and Joseph P. Balliro, were charged with transporting stolen jewelry in interstate commerce, knowing the same to have been stolen, in violation of 18, U.S.C. §§ 2314 and 2. All four defendants were convicted after a jury trial before U.S. District Judge Garrity. The evidence adduced at trial indicated that defendants Balliro and Strauss actually transported the goods, while defendants Zannino and Limone aided and abetted the commission of the offense.

On appeal, defendants Zannino and Limone contended that, since there was no evidence that they knew that the jewelry had been hidden outside Massachusetts, they could not "knowingly" have caused its transportation back to Massachusetts from New Hampshire. The Court of Appeals held that the term "knowing" applies only to the element of the goods having been stolen, and has no applicability to the goods being transported in interstate commerce. The case clearly held that the government's case could be based almost entirely on the uncorroborated testimony of an accomplice.

As a Special Attorney, U.S. Department of Justice, in-charge of the "Strike Force" against Organized Crime, I tried the case with Special Attorney William Kenney, Criminal Division, U.S. Department of Justice. Although I did not patricipate in preparing the appellate brief, I successfully argued the appeal before the Court of Appeals for the First Circuit.

Attorney France J. DiMento of Boston represented defendants Zannino and Limone. Attorney David Berman represented defendant Strauss. Attorney Joseph J. Balliro represented defendant Joseph P. Balliro.

Joseph J. Balliro
3 Arlington Street
Boston, Mass. 02116
Tel: (617) 227-5822

Francis J. DiMento
100 State Street
Boston, Mass. 02109
Tel: (617) 523-5253

William Kenney
U.S. Dept. of Justice
Penn Ave. and 10th Street N.W.
Washington, D.C. 20530
Tel: (202) 633-3516

David Berman
100 G.P. Hassett Drive
Medford, Mass. 02155
Tel: (617) 395-7520

United States v. Zannino, 468 F. 2d 1299 (1st Cir., 1972), cert. denied 410 U.S. 954 (1973)

This case involves the defendants in the Strauss case, supra, who filed a second motion for a new trial on September 22, 1971 on the basis of "newly discovered evidence". Defendants' first motion for a new trial had been denied on January 11, 1971, and the denial of that motion had been affirmed in U.S. v. Strauss et al, supra. The "newly discovered evidence" consisted of affidavits of two Boston police officers that they had observed the government's chief accomplice witness at a location different from the one where the witness had testifed at trial he had engaged in incriminatory conversations with some of the defendants.

Evidentiary hearings were held before District Judge Garrity and the second motion was denied, and the denial was affirmed on appeal.

As Special Attorney, U.S. Department of Justice, in-charge of the Department of Justice's Strike Force against Organized Crime, I was the chief trial counsel in the evidentiary hearing, assisted by Special Attorney Albert F. Cullen, Jr. I prepared the appellate brief with Attorney Cullen's aid, and successfully argued the case on appeal.

The defendants were represented by the same counsel as in the Strauss case, supra.

This case presents an excellent general discussion of the principles of "newly discovered evidence" and, specifically, whether "refreshed recollection" can constitute such evidence. The case indicates that, at least in those circumstances, it cannot.

Albert F. Cullen, Jr.
141 Tremont Street
Boston, Mass. 02111
Tel: (617) 482-8650

United States v. Griffin, 525 F. 2d 710 (1st Cir., 1975), cert. denied, 424 U.S. 945 (1976).

In June, 1974 the U.S. District Court for Massachusetts issued an order for enforced busing in the Boston public schools. In October, 1974 a police detail was assigned to an intersection in South Boston, some blocks from the Patrick Gavin School. Buses returning black students to their homes would normally have passed through that intersection. On the particular day in question, the school buses were rerouted. A crowd of 400 to 500 persons had gathered on the streets and sidewalks and was shouting racial slurs.

Traffic was moving slowly when Jean Louis, a black adult from Haiti, who was not a student, sought to drive by. Defendant called out "Let's get the (obscene) nigger." Thereupon a segment of the crowd ran to Louis' car, broke the window and dragged him out. When he sought to escape, defendant pursued him and beat him with a club.

Defendant was found guilty by a jury on both counts of an indictment. Count 1 charged a violation of 18 U.S.C. § 245 (b) (4) (A) for willfully injuring "any person.....in order to intimidate...any other person or any class of persons...without discrimination on account of race, color....(from attending any public school)". Count 2 charged a violation of 18 U.S.C. § 1509 for forcefully and willfully attempting "to...interfere with the due exercise of rights...under any order...of a court of the United States".

The Court of Appeals affirmed the conviction on Count 1, holding that the defendant, by the indiscriminate beating of an innocent black on a public street near a school at release time, intended to incult fear in other black parents and children, although the Court acknowledged that there was no direct evidence that by such an act of beating an adult the defendant intended to prevent black students from attending school.

The Court, however, reversed the conviction on Count 2, holding that there was no evidence that defendant knew that the busing order which he was protesting emanated from a federal court, as distinguished from some other source of authority.

My law partner at the time, former U.S. Attorney Paul F. Markham, tried the case and argued the appeal for the defendant Griffin by appointment of the Court. I prepared the appellate brief.

The incident of defendant's clubbing a black who was innocently traveling through a section of Boston received extensive national publicity and generated sympathic support for the black students who were being bused pursuant to Federal Court order.

Paul F. Markham
50 Congress Street
Boston, Mass. 02109
Tel: (617) 742-4150

McAleney v. United States, 539 F. 2d 282 (1st Cir., 1976).

This case involves a motion filed under 28 U.S.C. § 2255 to vacate a guilty plea and judgment of conviction on the ground that the Defendant

McAleney had been induced to plead guilty in reliance on his trial attorney's representation that the government had promised to recommend a three year sentence, but a seven year sentence had been imposed. Although the government had not made such a promise and did not make a recommendation, U.S. District Judge Freedman of Massachusetts, after an evidentiary hearing, allowed the motion to vacate the sentence. This action was affirmed on appeal.

The Court of Appeals for the First Circuit held that defendant McAleney was entitled to have his plea and the judgment vacated unless the government elected to have the plea stand and to have the defendant resentenced, provided that the government could in good conscience recommend a three year sentence and that the sentencing judge was willing to allow such a non-binding recommendation. The Court of Appeals stated that a defendant is entitled to credit his attorney's representation as to the fact of such an agreement and to rely on it.

This case imposed a strict duty on an attorney to make certain that, whenever participating in plea bargain proceedings, that any information he conveys to his client is accurate and complete. The case also indicated that the failure of an attorney to adhere to professional standards in this regard constitutes grounds for questioning that attorney's continued fitness to represent clients in federal court. It also suggested to sentencing judges that they must specifically inquire whether any promise had been made concerning recommendation of a particular sentence to the Court in accordance with Mawson v. United States, 463 F.2d 29 (1st. Cir., 1972).

I represented defendant McAleney in the evidentiary hearing before the District Court, prepared the appellate brief, and orally argued the case on appeal.

William A. Brown represented the United States.

William A. Brown
88 Broad Street
Boston, Mass. 02110
Tel: (617) 482-1001

Gerard J. Mazzola v. Transcript Newspaper, Inc., and Joseph Masiello, Civil Action No. 125701, Norfolk County Superior Court, 1977.

This was an action of libel and slander brought by a Dedham Selectman against the Dedham Transcript for publishing an oral statement of one Masiello that plaintiff Mazzola was a member of the Mafia. A five day jury trial was conducted before Superior Court Judge James P. Lynch, Jr. The jury found for the newspaper, but held Masiello liable for slander and awarded damages in the amount of $15,000.00.

The fact that Mazzola was a "public official" required the jury to find "actual malice" by "clear and convincing" evidence in the printing of the defamatory falsehood in order to warrant the recovery of damages from the newspaper. To establish actual knowledge on the part of the newspaper that a defamatory statement was false or was published with reckless disregard as to its truth or falsity is a heavy burden, yet one necessary to insure a frank and robust debate of political issues and personalities. This case illustrates the principles of New York Times Co. v Sullivan, 376 U.S. 254 (1964) in action.

I represented the plaintiff Mazzola. The finding by the jury that Masiello's allegation of Mazzola's underworld connections was not true cleared the selectman's reputation, which had been tarnished by the newspaper report. He is still involved in public affairs.

Boston Municipal Court Judge Walter J. Hurley represented defendant Masiello; the Transcript Newspaper, Inc. was represented by a Minneapolis law firm.

Judge Walter J. Hurley
Boston Municipal Court
Old Court House
Pemberton Square
Boston, Massachusetts 02108
Tel: (617) 725-8389

Blaikie v. Callahan, 691 F.2d 64 (1st Cir., 1982)

The case involved a petition for writ of habeas corpus in federal court concerning petitioner's conviction of murder in the state court. The first trial ended in a mistrial when the prosecutor failed to comply with a pre-trial agreement to produce all defendant's statements made to the police. A change of venue was ordered. The second trial during November 1976 ended with a conviction of first degree murder, resulting in a sentence of life imprisonment.

The judgment of conviction was affirmed by the Supreme Judicial Court in Commonwealth v. Blaikie, 375 Mass. 603 (1978).

A petition for a writ of habeas corpus was filed in the U.S. District Court for Massachusetts in January 1982. District Judge Mazzone denied the petition without any evidentiary hearing, which order was appealed.

The petition asserted that Blaikie had been denied his right to have compulsory process for obtaining witnesses in his own defense in violation of the due process clause, when the Superior Court refused to permit the introduction of his expert witness on the limited, but critical, issue of rigor mortis. The case had been sent to the jury with only the Commonwealth's expert testimony on this point relative to "deliberate premeditation" being presented. The commonwealth's expert testimony was allegedly not scientifically correct.

The Court of Appeals for the First Circuit affirmed the District Court's order denying the writ.

I prepared the petition and orally argued the appeal on behalf of Blaikie. Barbara A.H. Smith represented the Commonwealth. I had previously assisted chief counsel Daniel G. Harrington in both trials and in the preparation of the brief to the Supreme Judicial Court. I was U.S. Attorney when the appeal was argued before the Supreme Judicial Court and did not participate in that oral argument. After returning to private practice, I filed the petition for habeas corpus in the U.S. District Court.

The case was notorious because the murder victim had been found buried in the basement of petitioner's home ten months after he had last been seen alive on January 14, 1975. The case presents a good examination of the law relative to habeas corpus.

Barbara A.H. Smith
Attorney General's Office
1 Ashburton Place
Boston, Mass. 02108-1698
Tel: (617) 727-8400

Daniel G. Harrington
18 Tremont Street
Boston, Mass.
Tel: (617) 227-1795

Alice E. Richmond
60 State Street
Boston, Mass.
Tel: (617) 227-1795

Commonwealth v. O'Loughlin, 17 Mass. App. Ct. 972 (1984)

Defendant O'Loughlin was charged with assault with intent to murder; two counts of rape; assault and battery by means of a dangerous weapon; indecent assault and battery on a female under 14 years of age, sodomy; kidnapping and possession of marijuana. The charges arose out of a sexual attack on an eleven year old girl on April 19, 1982 sometime between 7:30 p.m. and 8:00 p.m. in Framingham, Mass.

The case was tried to a jury before Superior Court Justice John Paul Sullivan during February 1983. The defendant was convicted on the two counts of rape; assualt and battery by means of a dangerous weapon; indecent assault and battery; kidnapping; and possession of marijuana. He was acquitted on the assault with intent to murder charge. The trial judge entered a required finding of not guilty on the sodomy charge before the case was submitted to the jury. The possession of marijuana charge was filed at the time of sentencing.

The defendent was sentenced to a term of from four to six years at Walpole Correctional Institution.

The chief issue on appeal was whether defendant's motion to suppress identifications of him should have been allowed because the out-of-court identification made by the victim on April 19, 1982 was the result of an "unnecessarily suggestive" one-on-one personal confrontation and because the in-court identification was not shown by "clear and convincing evidence" to have had a source independent of the suggestive confrontation. The Massachusetts Appeals Court affirmed the conviction.

I represented the defendant O'Loughlin in trying the case, preparing the appellate brief, and orally arguing the appeal.

Assistant District Attorney Phyllis Broker (now in the Suffolk County District Attorney's Office) represented the Commonwealth.

The case illustrates the devasting impact of eye-witness testimony based on an out-of-court identification made as a result of a one-on-one confrontation between the victim and her alleged assailant. Such an identification, made at a time when the victim is being assisted by the police and while the defendant is without legal counsel, is inherently unreliable. Yet such an identification is very difficult to undermine before a jury.

Phyllis Broker
District Attorney of Suffolk County's Office
New Court House
Pemberton Square
Boston, Mass. 02108
Tel: (617) 725-8600

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I was U.S. Attorney for Massachusetts when the so-called Angiulo organized crime investigation was conducted which resulted in a national milestone in organized crime prosecution. It marked the first time the top echelon of a Mafia faction was convicted of operating a criminal enterprise under the federal RICO statute. The evidence which was the basis for the conviction was obtained by court-authorized electronic surveillance conducted over a four month period during 1981. The court-authorized "bug" had been planted by the F.B.I. in the headquarters of the Angiulo organization.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or businsess interest.

   None. I shall resign as Counsel to the law firm of Sheridan, Garrahan & Lander effective upon being sworn in as a judge. I shall cease receiving my salary upon such resignation. I shall receive no compensation after my resignation for work on pending litigation or for any other reason. Upon resignation, I shall withdraw my interest in the firm's profit sharing plan.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I will disqualify myself from hearing cases which relate to matters in which my law firm was involved as counsel and from hearing cases in which a former client is a party or my law firm represents a party. I shall advise parties appearing before me of my previous legal affiliations. I shall, of course, follow the ethical guidelines promulgated by the Bar Associations.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

   See copy of Executive Personnel Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

   See financial net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   Candidate for the Democratic Party's nomination for Attorney General of Massachusetts, September 10, 1974.

   Co-Chairman for Massachusetts of the Shriver for President Campaign Committee, March 9, 1976.

   Nominee of the Republican Party for Attorney General of Massachusetts, November 4, 1986.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of the time devoted to each.

When I was a Special Trial Attorney, Criminal Division, United States Department of Justice, I was sent to Mississippi in the Summer of 1964 by Attorney General Robert Kennedy as a part of a select unit to represent the federal government in protecting the civil rights volunteers in their conducting of "Freedom Schools". My clients have included court appointments to represent indigent criminal defendants in cases involving murder and other serious crimes. I was appointed on the average of one criminal case a year when in private practice.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inapprorporate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates-- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies.

No.

3. Is there a selection commission in you jurisdiction to recommend candidates for nomination to federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is a judicial selection commission in the District of Massachusetts and it recommended several individuals to the United States Department of Justice, including me, for consideration. I was interviewed by various officials of the United States Department of Justice, including assistant Attorney General Markman, Office of Legal Policy, Deputy Associaté Attorney General Knapp, and Messers. Matthews and Liebman of the Office of Legal Policy and I was selected by the Department as the potential nominee. Thereafter, I underwent an F.B.I. background investigation and an A.B.A. investigation conducted by Ralph I. Lancaster, Jr., One Monument Square, Portland, ME. 04101 prior to being nominated by President Reagan.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the jucidiary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institution in the manner of an administrator with continuing oversight responsibilities.

In our form of government, the individual, as a member of society, has consented to transfer his authority to govern himself to a representative government which is comprised, in our federal system, of three branches with expressly limited and defined powers. Under our constitution, each branch of government is co-equal with the other.

The legislative branch of government is the one closest to the people, and for that reason, in a representative democracy, the one, which most accurately reflects its views.

The courts should not substitute their own personal predilections as to the feasibility of public policy for that of representative legislative bodies. The judiciary has the responsibility of supervising legal procedure and practice in the courts, not to controlling legislative and executive policy-making.

It was the traditional view that the function of the judicial branch was to decide cases and controversies of a justiciable nature. The courts were reluctant to interfere in political and social questions, having a respectful attitude toward the integrity of the public policy as formulated by its other co-equal branches. It was natural for the courts to have this attitude of respect, for the other branches possess greater expertise in the vast and various areas of public responsibility within their own respective jurisdictions, than does the judiciary. Judges were never presumed to possess any peculiar knowledge of the feasibility of public measures. Judges are presumed to be experts in the law, not in the formulation of public policy.

More importantly, judges have no constitutional authority to formulate such policy. They are not the people's representatives in this regard. The constitution delegated this power to another branch--to the legislature, the law-making branch, which has been elected by the people.

In enacting the law the legislative branch is primary, its exercises supported by presumptions of right and legality and not to be interfered with by any judicial conception as to the wisdom of their enactments.

Yet "power," as James Madison perceptively noted in his federalist papers, "is of an encroaching nature, and it, therefore, ought to be effectively restrained fom passing the limits assigned to it."

In our system of government, it has been the fundamental role of the constitution to represent the will of the people in defining the allocation of power to the three branches of government and, by such definition, limiting such power. Thomas Jefferson, a philosopher of government, as well as its skilled practitioner, reflected that since "our peculiar security is in possession of a written constitution, let us not make it a blank paper by (judicial) construction." The courts themselves are required to abide by the terms of a written constitution.

Thus, judicial power of review of legislative and executive acts and the power to declare them void was conceived in very narrow terms--as a means of

policing the constitutional boundaries of expressly limited delegated powers--not as a means of affirmatively devising the public policy itself. The framers never conceived that judicial power would someday be construed by the courts themselves to be an absolute right to supersede the exercise of power by the other branches within the defined boundaries of their delegated authority.

As Judge Learned Hand put it:

> "Judicial review should be confined to occasions when the statute or order was outside the grant of power to the grantee, and should not include a review of how the power has been exercised (by the grantee)."

Under the guise of the elastic due process clause the judiciary, unrepresentative of the people, should not re-write the constitution according to its own personal preferences and thereby invade the exclusive policy jurisdictions of its sister branches.

If the role of the judiciary becomes the formulator of political and social policy and the supervisor of administrative agencies, public policies which have been defeated in the political arena, gain victory by judicial fiat; and highly specialized executive and administrative agencies are run by non-expert members of the judiciary.

What happens when the courts substitute themselves for the executive and legislature? Instead of concerning themselves with the resolution of judicial cases and controversies, the courts become mired in day-to-day political and administrative details, as they seek to manage and control what Justice Cardozo termed, "the fugitive exigencies of the passing day." And more importantly, the executive tends to abdicate its responsibilities and rely on the judiciary to make the tough decisions, which are then sometimes made contrary to the popular will.

Also, when there is serious confrontation between the branches over major policy traceable directly to a lack of judicial restraint, it is the judiciary which ultimately suffers. History teaches us that when the Supreme Court declared unconstitutional legislation designed to implement eight major policies of the Roosevelt Administration because contrary to the court's then current economic view, within a two-year period thirty-three bills were filed to curb the power of the court--and seven of the eight rejected policies soon became law.

Professor James Bradley Thayer, a great teacher and philosopher of the law, warned that judicial review should be sparingly used because it is attended at all times by a serious evil--namely, the correction comes from outside, rather than from the people. Thayer warned that "the tendency of a common and easy resort to this great function (. . . Of judicial review) is to dwarf the political capacity of the people and to deaden its sense of moral responsibility."

It is the essential responsibility of the judiciary to resolve real legal disputes between real parties under rules of established law. The courts must insure that the parties to the suit represent truly antagonistic legal interests which clearly demand judicial intervention for resolution.

An individual law suit should not be used as the means for the judiciary to create broad orders extending to people who are not parties to the case. Constitutional construction should be undertaken only as a last resort in resolving a legal dispute. The judiciary is constitutionally required to discard its own personal opinion, to seek to determine the framers' intention as to the meaning of the Constitution, and to apply that intention as found to the pending factual controversy. It is the responsibility of the judiciary to explain what the Constitution says and not to impose personal views as to what the Constitution means. The least democratic branch must interpret the Constitution strictly and with restraint.

FINANCIAL STATEMENT

NET WORTH

September 18, 1987

Edward F. & Ellen M.Harrington

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	$ 16,700.00	Notes payable to banks—secured	$ 18,693.00
U.S. Government securities—add schedule	0.00	Notes payable to banks—unsecured	0.00
Listed securities—add schedule	18,137.00	Notes payable to relatives	0.00
Unlisted securities—add schedule	0.00	Notes payable to others	0.00
Accounts and notes receivable:		Accounts and bills due	0.00
Due from relatives and friends	0.00	Unpaid income tax	0.00
Due from others	18,300.00	Other unpaid tax and interest	0.00
Doubtful	0.00	Real estate mortgages payable—add schedule	42,663.00
Real estate owned—add schedule	450,000.00	Chattel mortgages and other liens payable	0.00
Real estate mortgages receivable	0.00	Other debts—itemize:	0.00
Autos and other personal property	35,000.00		
Cash value—life insurance	6,083.00		
Other assets—itemize:	17,754.00		
IRA Accounts:			
Edward: Shawmut Needham $4534			
Fidelity Puritan 12,084			
Ellen: Shawmut Needham 1,136			
Total assets	$ 561,974.00	Total liabilities	$ 61,356.00
		Net worth	$ 500,618.00
		Total liabilities and net worth	$ 561,974.00

CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule.)	No
On leases or contracts		Are you defendant in any suits or legal actions?	No
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other special debt			

COLLEGE LOANS of two dependent sons:

Edward P. Harrington - Social Security # 018-62-9947

Graduation date: 5/87

1.	Education Loan Services, Inc. P.O. Box 6319 Boston, MA 02212 Acct. # 0062-001-20-018629947-1	$5,000.00
2.	National Direct Student Loan (NDSL)	1,200.00

William T. Harrington - Social Security # 023-64-9138

Graduation date: 5/89

1.	Education Loan Services, Inc. P.O. Box 6319 Boston, MA 02212 Acc't. No. 0062-001-20-023649138-1	$5,000.00
2.	National Direct Student Loan (NDSL)	2,000.00

SCHEDULES

FINANCIAL STATEMENT - NET WORTH

ASSETS:

Listed Securities:

1. Chevron Corporation.

20 common shares owned by Edward F. & Ellen M. Harrington. Market value as of 9/18/87 - $51,25 per share	$ 1,025.00

2. Loomis-Sayles Capital Development Fund.

572.512 shares owned by Edward F. & Ellen M. Harrington. Market value as of 9/18/87 - $29.89 per share	17,112.00
	$18,137.00

Accounts and Notes Receivable:

Due from others:

Loan made to "Ted Harrington Committee: to pay off campaign debt of Committee. Check #7426, dated March 17, 1987, drawn on Shatmut Needham Bank.	$18,300.00

Real Estate Owned:

Home:	732 Great Plain Avenue Needham, MA 02192		
	Fair Market Value	$275,000.00	$275,000.00
Summer Home:	102 Cliff Avenue Portsmouth, RI 02871		
	Fair Market Value	$175,000.00	$175,000.00
			$450,000.00

LIABILITIES:

Notes Payable to Banks - secured:

$20,000.00 loan to Edward F. Harrington who, in turn, loaned it to the "Ted Harrington Committee."

Fall River Municipal Employees Credit Union
333 Milliken Boulevard
Fall River, MA 02720

Security: Bank book of Elizabeth C. Harrington (mother).

Date: March 14, 1987
Account # 01-004-371

Balance as of 9/1/87 - $18,693.42

Real Estate Mortgages Payable:

Edward F. & Ellen M. Harrington refinanced home on April 12, 1984.

15-year, variable rate at:

The Boston Five Cents Savings Bank
Ten School Street
Boston, MA 02108

Account # 041-135593

Amount borrowed: $25,000.00

Balance as of 9/1/87 - $22,613.92

Edward F. & Ellen M. Harrington have a Real Line of Credit - Equity loan on their home, for summer home renovations.

Bay Bank Norfolk County Trust Company
Dedham, MA 02026

Account # 997-08069

Amount borrowed: $20,000.00

Balance as of 9/1/87 $20,049.43

SF 278 (Rev. 1/88)
Office of Personnel Management

Financial Disclosure Report

Page 1

Reporting Status (Check Appropriate Box)		Agency Use Only	OGE Use Only	Date of Appointment, Candidacy, Election or Nomination (Mo., Day, Yr.)	Termination Date (If Applicable) (Month, Day, Year)
☐ Incumbent	☒ New Entrant, Nominee, or Candidate ☐ Termination Filer			September 18, 1987	

	Last Name	First Name and Middle Initial
Reporting Individual's Name	Harrington	Edward F.
Position for Which Filing	Title of Position: U.S. District Court Judgeship	Department or Agency (If Applicable):
Location of Present Office	Address (Number, Street, City, State and ZIP Code): 161 Worcester Road, Framingham, MA 01701	Telephone No. (Include Area Code): (617) 879-5700
Position(s) Held With the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: None	

	Name of Congressional Committee Considering Nomination	Do You Intend to Create a Qualified Diversified Trust?
Presidential Nominees Subject to Senate Confirmation	Judiciary Committee	☐ Yes ☒ No

	Signature of Reporting Individual	Date (Month, Day, Year)
Certification: I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.	Edward F. Harrington	9-19-87
Other Review (If desired by agency)	Signature of Other Reviewer:	Date (Month, Day, Year):
Agency Ethics Official's Opinion: The information contained in this report discloses no conflict of interest under applicable laws and regulations.	Signature of Designated Agency Ethics Official/Reviewing Official:	Date (Month, Day, Year):
Office of Government Ethics Use Only	Signature:	Date (Month, Day, Year):

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I (Liabilities)**—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II (Agreements and Arrangements)**—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if comments are continued on the reverse side) ☐

PREVIOUS EDITION USABLE

278-1988

784

SF 278 (Rev. 1/95)
5 CFR Chapter XIV
U.S. Office of Personnel Management

Form Approved: OMB No. 3209-0002

Reporting Individual's Name	Assets and Income	Page Number	Schedule
EDWARD F. HARRINGTON		2	A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets	BLOCK C Income																										BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)								Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)									Actual Amount Only If "Other" Specified	Date (Mo., Day, Yr.) Only If Honoraria	If yes, complete Sched. B Part I for these assets including those sold for a loss.	
	None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
S or DC Example: XYZ Common			X				X									X									X	
Example: Doe Jones & Smith, Hometown, USA		X											partnership income									$50,000			
1 Sheridan, Garrahan & Lander 161 Worcester Rd Framingham MA													Salary Bonus									$109,000			
2 WCVB5TV-Program Participant													Fee									240	12-14-86		
3 Chevron Corp. - Common		X					X								X										
4 Loomis-Sayles - Cap. Develop.				X			X										X								
5 Money Market Account Shawmut Needham Bank			X						X								X								
6 IRA - Shawmut Needham			X																						
Fidelity Puritan			X																						
7 S IRA - Shawmut Needham	X																								
8 Mutual Bank for Savings		X							X						X										
9 AEtna Life Transamerica Occidental Life			X						X						X										
10																									

PREVIOUS EDITION USABLE

270-200

SF 278 (Rev. 1/88)
Final Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting Individual's Name

Edward F. Harrington

Page Number	3	Schedule C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

		Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
S or DC	Example	First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	25 yrs.			X		
		John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
1		Fall River Municipal Employees Credit Union 133 Milliken Blvd., Fall River, MA 02720	Promissory note	1987	10.5%	10 yrs		X			
2											
3											
4											
5											
6											

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☒

	Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example:	Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Home town, USA	7/76 ptnership agmnt
	None		

PREVIOUS EDITION USABLE

278-10B

Reporting Individual's Name
EDWARD F. HARRINGTON

Page Number	4	Schedule D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Example: Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/82	6/83
Example: Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/76	11/83
Sheridan, Carrahan & Lander 161 Worcester Road Framingham, MA 01701	Law Firm	Of Counsel	11/81	

Part II
Compensation in Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☐

Source (Name and Address)	Brief Description of Duties
Example: Doe Jones & Smith, Hometown, USA	Legal services
Example: Metro University Fiduciary c/o Doe Jones & Smith, Hometown, USA	Legal services in connection with university construction
Sheridan,Carrahan & Lander, 161 Worcester Rd.Framingham MA	Legal services
Mutual Bank for Savings, 45 Franklin St., Boston, MA	Legal services in connection with investigation into Bank's political campaign practices.
Steven Potter, 10 Countryside Rd., Natick, MA	Legal services in connection with case involving transportation of stolen property.
Estate of Elizabeth L.Power,2175 Mill St.Framingham, MA	Legal services in connection with suit for redelivery of books and pictures.
Mark Salatiello, Railroad Ave., East Douglas, MA	Legal services in connection with case involving manslaughter.
Mamoud Salameh, 4 Sherman St., Everett, MA	Legal services in connection with case involving transportation of stolen property.
Jeffrey Crown, 1 Universal St., Framingham, MA	Legal services in connection with case involving rape.
Arthur Grontzos, 81 Warren Rd., Framingham, MA	Legal services in connection with suit relating to construction contract.

PREVIOUS EDITION USABLE

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
James J. Beerbower
International Square
Suite 1275
1875 Eye Street, N.W.
Washington, DC 20006

BOARD OF GOVERNORS
LIAISON
Sharp Whitmore
3065 Carol Knoll
Fallbrook, CA 92028

STAFF DIRECTOR
Wantland L. Sandel, Jr.
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5685

STAFF ASSISTANT
Diane Livingston
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5701

AMERICAN BAR ASSOCIATION **Standing Committee on Federal Judiciary**
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

September 22, 1987

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: EDWARD F. HARRINGTON
United States District Court
District of Massachusetts

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Edward F. Harrington for appointment as Judge of the United States District Court for the District of Massachusetts.

A substantial majority of our Committee is of the opinion that Mr. Harrington is "Qualified" for this appointment. The minority found him to be Not Qualified.

Sincerely yours,

Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

I. BIOGRAPHICAL INFORMATION

1. Full Name:

William Shepard Rose, Jr.

2. Address

Office: McNair Law Firm, P.A.
NCNB Building
59 Pope Avenue
Post Office Box 5914
Hilton Head Island, SC 29938

Residence: 11 Jessamine Place
Hilton Head Island, SC 29928

Washington Address: 130 Waterford Place
Alexandria, Virginia 22314

3. Date and Place of Birth:

Columbia, South Carolina, March 9, 1948

4. Marital Status:

Frances John Hobbs Rose
Housewife

5. Education:

1966 - 1970	University of the South - BA English, May 1970
Summer 1969	University of Cincinnati - Summer School 1969
1970 - 1973	University of South Carolina - JD Law, June 1973
Summer 1972	University of Denver - Law School - Summer Clinical Legal Internship Program - 1972
1974 - 1976	Georgetown University Law Center - LLM Taxation, February 1976

6. Employment Record:

A. United States Department of the Treasury
Office of Chief Counsel, Tax Court Litigation
Division, Internal Revenue Service
1111 Constitution Avenue
Washington, D.C. 20224
August 1973 - December 1976

B. Frost & Jacobs
Central Trust Center
201 East 5th Street
Cincinnati, Ohio 45202
February 1977 - December 1980
(Associate - Attorney)

C. McNair Law Firm, P.A.
Post Office Box 5914
Hilton Head Island, South Carolina 29938
February 1981 - Present
(Associate Until 1983 - Shareholder to the Present)

D. MBR Corporation
RR1, Box 111A
Rembert, South Carolina 29128
Director and Secretary, 1974 - Present - Managed Property
Family Corporation Holding Real Estate in South Carolina

E. Adwell Corporation
Post Office Box 1107
Jacksonville, Illinois 62651
Director - 1985 to Present
Family Corporation Holding Real Estate in Illinois and Florida

F. Sea Pines Montessori School
9 Fox Grape Road
Hilton Head Island, South Carolina 29928
Director - 1984 - 1985, 1985 - 1986
Chairman - 1986 - 1987

G. Sea Pines Montessori School Parents Association
9 Fox Grape Road
Hilton Head Island, South Carolina 29928
Member At Large - 1984 - 1985

H. Hilton Head Preparatory School
8 Fox Grape Road
Hilton Head Island, South Carolina 29928
Director - 1987 - Present
Finance Committee - 1987 - Resigned October 6, 1987

I. Hilton Head Planned Parenthood
160 Triangle Square
Hilton Head Island, South Carolina 29938
Local Affiliate Advisory Board
1986 - Resigned October 6, 1987

J. Hilton Head Cotillion
15 Pine Island Road
Hilton Head, South Carolina 29928
Co-Chairman
Entertainment Committee - 1986

K. R.A.T. Corporation
Post Office Box 5122
Hilton Head Island, South Carolina 29938
Director/Secretary - 1986 - Resigned October 6, 1987
Corporation Which Owns an Airplane for Personal Use

L. Foris Corporation
11 Jessamine Place
Hilton Head Island, South Carolina 29928
Director/Vice President/Secretary - 1980 - 1982
Shell Corporation Created to Enter Export of Wood Products but Never Went into Business

M. Margaret H. Harrison Foundation
c/o McNair Law Firm, P.A.
Post Office Box 5914
Hilton Head Island, South Carolina 29938
Trustee of Foundation - 1986 - Resigned October 6, 1987

7. Military Service:

None

8. Honors and Awards:

None

9. Bar Associations

South Carolina Bar
South Carolina Bar - Tax Section
Beaufort County Bar Association
Hilton Head Island Bar Association
District of Columbia Bar
Ohio Bar Association
Cincinnati Bar Association
American Bar Association
American Bar Association - Tax Section
American Bar Association - Tax Section Accounting Committee, Chairman of Subcommittee on Accounting Methods - 1975
South Carolina Defense Trial Attorney's Association

10. Other Memberships:

Ducks Unlimited
South Carolina Historical Society
Caroliniana Ball

11. Court Admissions:

United States Supreme Court
United States District Court - Southern District of Ohio
United States District Court for the District of Columbia
United States Tax Court
District of Columbia Court of Appeals
South Carolina Supreme Court
Ohio Supreme Court

12. Published Writings:

A. "Warren Jones Co. - Ninth Circuit Distills the Legal Quagmire of Code Section 1001(b)"
Taxes-The Tax Magazine (July 1976) P. 410

B. "The IRS About to Review its Attack on the Treatment of Illegal Price Allowances"
Journal of Taxation (November 1977) P. 298

13. Health:

Excellent. Last Physical Examination - August 1986

14. Judicial Office:

None

15. Citations:

Not Applicable

16. Public Office:

South Carolina Governor's Constable
1981 - Present
Position Appointed by the Governor

South Carolina Notary Public
1981 - Present
Position Appointed by the Governor

Ohio Notary Public
1977 - Present
Position Appointed by the Governor

17. Legal Career:

A. Description of Law Practice.

I. United States Department of the Treasury, Office of Chief Counsel, Tax Court Litigation Division, Internal Revenue Service, 1111 Constitution Avenue, Washington, D.C. August 1973 - December 1976 (Trial Attorney)

My three and one-half years in the Tax Court Litigation Division of the Office of Chief Counsel for the Internal Revenue Service, in conjunction with my attending Georgetown University Law Center at night so as to earn an LLM-Taxation degree, are the education and training experiences which form the foundation of my legal career. In the Office of Chief Counsel, my duties and cases afforded the experience of dealing with every division of Chief Counsel's Office, the Technical Division of the Internal Revenue Service (Washington, D.C.) and various regional centers of the Internal Revenue Service. On several occasions I also had the opportunity to work with various members of the Tax Division of the Department of Justice concerning the coordination of litigation policy.

II. Frost & Jacobs, Central Trust Center, 201 East 5th Street, Cincinnati, Ohio 45202, February 1977 - December 1980 (Associate - Attorney)

After leaving government for the private practice of law, I continued my legal career by implementing and using the legal skills and knowledge I had acquired. My practice was not confined solely to tax matters and I began to be extensively involved in many general business and corporate matters. This corporate practice and experience enriched my tax practice and knowledge because it gave me an indepth understanding of corporate and business law. The first four years of the private practice of law were important because these experiences augmented my skills as a lawyer and gave me the knowledge of how a large law firm should be organized and operated.

III. McNair Law Firm, P.A., Post Office Box 5914, Hilton Head Island, 29938, February 1981 - Present (Associate until 1983 - Shareholder to the Present)

Beginning in 1981 with the McNair Law Firm on Hilton Head Island, I began to build a corporate/tax practice based on clients I brought personally to the law firm. My practice has expanded beyond merely corporate/tax and general business law to include other disciplines of law. My practice of law to a great extent now involves handling client matters and when or where appropriate delegating to a partner or associate the work to be performed in such partner's or associate's speciality of law.

In conjunction with my practice of law, in the last two years as a director of the family's corporation (Adwell Corporation), I have been involved with members of management. My knowledge and skills of the law and business in general have thrust me into forming and articulating corporate policy and the deployment of management. These experiences have further enhanced my managerial skills.

B. General Character of Law Practice

My private law practice has undergone three phases within the 11 years since leaving the Chief Counsel's Office for Internal Revenue Service.

Upon entering private practice with the law firm of Frost & Jacobs, Cincinnati, Ohio (1977), for approximately two years my duties and responsibilities were strictly related to tax matters for clients. These matters involved both federal and state taxes. In 1978 through 1980 my law practice changed to include fifty to sixty percent of my billable time with general corporate and business law.

Beginning in 1981 I moved to Hilton Head Island, South Carolina, with the responsibility of developing the business and tax practice of the McNair Law Firm. The challenge has been successful and rewarding in that a good business and tax practice has been developed. My duties as an attorney and partner have in the last three years moved towards managing other attorneys in handling client matters.

C. Court Appearances

Appearances in Federal or State courts since leaving the Office of Chief Counsel for Internal Revenue Service have been minimal. With the law firm of Frost & Jacobs I assisted senior partners in various tax cases of which all were settled prior to trial. Recently, within the last eight months I filed a case in the U.S. Tax Court on behalf of a client. The case is set for trial early next year and since my departure from the McNair Law Firm I have caused my name to be withdrawn as Counsel and the case assigned to another attorney within the law firm.

18. Litigation:

My tax practice, since leaving government service, has been primarily transactional in nature. I have not brought a case to court, except recently a petition to the U.S. Tax Court on behalf of a client. Since leaving the McNair Law Firm the case has been transferred to another partner and therefore I did not have the opportunity to litigate the case. During my association with Frost and Jacobs, Cincinnati, Ohio, I assisted several partners in several tax cases but did not personally handle such cases. My experience in the tax litigation area is manifested by my government service with the Office of Chief Counsel, Internal Revenue Service.

19. Legal Activities:

The most significant legal activities which I have pursued from a national or regional perspective were when I was an attorney in the Office of Chief Counsel for Internal Revenue Service. The experience

offered an indepth experience in tax controversies which included formulating policy and arguments in attacking tax shelter cases. At this early stage, the U.S. Tax Court was beginning to see a tremendous surge of cases being filed by taxpayers and the traditional legal arguments were effective in exposing the abuses. The novel legal arguments were, however, sometimes ineffective in the courts and the lack of success necessitated legislative solutions. In private practice the most significant legal activity can be best characterized as providing quality legal services at an affordable and reasonable price. The business and transactional tax practice that I enjoyed did not afford radical or innovative legal solutions. Most clients were conservative fiscally and wanted a direct, non-controversial solution to their legal and tax problems.

II. FINANCIAL DATA AND CONFLICTS OF INTEREST

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Upon confirmation by the Senate, my share ownership with the McNair Law Firm, P.A. will be redeemed. The only remaining financial tie will be that my account in the McNair Law Firm Profit Sharing Plan will remain in the Plan until it is withdrawn and rolled over into an IRA. Furthermore, (except for the Adwell Corporation) I have resigned from all corporate boards and any position I may have held as an officer of a corporation. Upon confirmation by the Senate I will resign from the Corporate Board of the Adwell Corporation. Subsequent to confirmation there will be no other financial ties to any other professional business for any financial or business interest.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

With regard to any client that I have represented in private practice, I will not participate in any deliberations as it relates to such client. Similarly, in any area of the law which I have been actively involved on behalf of a client in a matter or issue under litigation in the last two years I will recuse myself from those deliberations. As to those matters which I have recused myself, a Deputy Assistant Attorney General will handle such matters and who will be under the direct supervision of the Deputy Attorney General and the Attorney General. Full disclosure of such conflict would also be made to other appropriate personnel within the Department of Justice under established procedures and guidelines.

In regards to matters for which the McNair Law Firm or any of its lawyers may be involved in which come before the Department of Justice, Tax Division, I would recuse myself from considering the issue and would follow Department of Justice procedures for conflicts.

3. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

None

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached SF 278, Financial Disclosure Report

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

See attached Statement

6. Have you ever held a position or played a roll in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

(a) Senator Strom Thurmond - 1984 Senate Campaign
Beaufort County Coordinator

(b) McMaster for Senate - 1986 - South Carolina
Assisted McMaster campaign to raise funds for the Senate campaign in Beaufort County.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

There are certainly disadvantaged persons on Hilton Head Island, South Carolina. To alleviate the needs of the less advantaged, volunteerism has been my form of contribution to institutional Social Services. In conjunction with such needs, I have devoted considerable time to soliciting funds for the County United Way and educational fund drives for scholarships for pre-school children.

2. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

To my knowledge I have never belonged to any organization which discriminates against any group on the basis of race, religion or national origin. As to organizations, which discriminate through practical implementation of membership policies, I am also unaware of any such policy whether exercised privately or tacitly by any organization to which I now or have belonged.

WILLIAM S. ROSE, JR.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	1,000		Notes payable to banks—secured	None	
U.S. Government securities—add schedule	None		Notes payable to banks—unsecured	None	
Listed securities—add schedule	None		Notes payable to relatives	None	
Unlisted securities—add schedule A	643,000		Notes payable to others	None	
Accounts and notes receivable:			Accounts and bills due	1,200	
Due from relatives and friends	None		Unpaid income tax	None	
Due from others	None		Other unpaid tax and interest	None	
Doubtful	None		Real estate mortgages payable—add schedule B	125,000	
Real estate owned—add schedule	None		Chattel mortgages and other liens payable	None	
Real estate mortgages receivable *	60,000		Other debts—itemize:	None	
Autos and other personal property	None				
Cash value—life insurance					
Other assets—itemize:					
IRA - Investment Co. of Am.	24,700	00			
McNair Profitsharing Plan	31,237	31	Total liabilities	126,000	
IRS Credit Union	288	09	Net worth	634,025	00
Total assets	760,225	40	Total liabilities and net worth	760,225	40
CONTINGENT LIABILITIES			**GENERAL INFORMATION**		
As endorser, comaker or guarantor***	38,463	54	Are any assets pledged? (Add schedule.)	No	
On leases or contracts **	18,150		Are you defendant in any suits or legal actions?	No	
Legal Claims	None		Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax	10,000				
Other special debt	None				

* My wife and I own our personal property jointly. The approximate total value is $120,000. Accordingly, one-half of the value of the personal property is included in the financial statement.

** In moving to Alexandria, Virginia, I have incurred an obligation to pay monthly lease payments. Accordingly, under the terms of the lease, I have an obligation to pay monthly lease payments which aggregate in the total amount given.

*** Until confirmed by the Senate, I have guaranteed two promissory notes and a revolving line of credit for the McNair Law Firm in the total amount of $13,463.54. Upon confirmation, the guarantee will be extinguished.

As part of my ownership in R.A.T. Corporation which owns an aircraft, I have guaranteed a corporate loan for the aircraft in the amount of $25,000.

WILLIAM S. ROSE, JR.

SCHEDULE A

200 sh.	Traders of Camden (Approximate)	$ 3,000
333 sh.	MBR Corporation (1/3 interest)	$625,000
	R.A.T. Corporation (Approximate)	15,000
		$643,000

WILLIAM S. ROSE, JR.

SCHEDULE B

Atlantic Savings Bank - Mortgage in the amount of $125,000 at 8.5% for 15 years.

This mortgage covers the residence owned by my wife on Hilton Head Island, South Carolina. Although I have no ownership interest in the residence I am jointly and severally liable on the mortgage and therefore have put the whole liability on my balance sheet.

FRANCES H. ROSE

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	2,000	Notes payable to banks—secured	
U.S. Government securities—add schedule A	840,781	Notes payable to banks—unsecured	None
Listed securities—add schedule B	866,938.07	Notes payable to relatives	None
Unlisted securities—add schedule C	37,000	Notes payable to others	None
Accounts and notes receivable:		Accounts and bills due	1,200
Due from relatives and friends	None	Unpaid income tax	None
Due from others	None	Other unpaid tax and interest	None
Doubtful	None	Real estate mortgages payable—add schedule E	125,000
Real estate owned—add schedule D	483,000	Chattel mortgages and other liens payable	None
Real estate mortgages receivable	-	Other debts—itemize: None	
Autos and other personal property*	60,000		
Cash value—life insurance	None		
Other assets—itemize:			
		Total liabilities	126,200.00
		Net worth	2,163,519.07
Total assets	2,289,719.07	Total liabilities and net worth	2,289,719.07
CONTINGENT LIABILITIES		**GENERAL INFORMATION**	
As endorser, comaker or guarantor	None	Are any assets pledged? (Add schedule.)	None
On leases or contracts **	18,150	Are you defendant in any suits or legal actions?	No
Legal Claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	4,000		
Other special debt	None		

* My husband and I own our personal property jointly. The approximate total value is $120,000. Accordingly, one-half of the value of the personal property is included in the financial statement.

** In moving to Alexandria, Virginia, I have incurred an obligation to pay monthly lease payments. Accordingly, under the terms of the lease, I have an obligation to pay monthly lease payments which aggregate in the total amount given.

FRANCES H. ROSE

SCHEDULE A

U.S. GOVERNMENT SECURITIES

300,000	U.S. Treasury Bonds Due 8-15-2017	8.78%	$ 294,000
500,000	U.S. Treasury Bonds Due 9-30-89	8.5%	505,000
50,000	U.S. Treasury Bond Due 2002-2007	7.875%	41.781
			$ 840,781

FRANCES H. ROSE

SCHEDULE B

Listed Securities

Alex. Brown & Sons		
	Tax Free Cash Reserves, Inc.	31,424.00
50 Sh.	Berkshire Hathaway, Inc.	150,000.00
1800 Sh.	SEI Corporation	24,750.00
Gadsden Alabama Dev. Bond		10,150.00
Parrish Alabama Dev. Bond		10,150.00
South Carolina State G/O		108,270.00
429	Bell South Corporation	17,106.37
2	Berkshire Hathaway	6,000.00
858	FPL Group, Inc.	26,490.75
572	Gen. Electric	26,812.50
429	GTE	16,194.75
1,500	Norfolk Southern Corp.	36,750.00
1,000	Pillsbury Co.	35,125.00
345	So. Western Bell Corp.	13,325.62
286	Texas Utilities	8,401.25
250	Weyerhaeuser Co.	9,375.00
NCNB Money Market Account		336,612.83
		$ 866,938.07

FRANCES H. ROSE

SCHEDULE C

Unlisted Securities

Bagley Building Co. (approximately)	$ 3,000.00
Rosewoods Partnership	15,000.00
Mt. Pleasant Golf Investors	10,000.00
Ocala Golf Limited Partnership	9,000.00
	$ 37,000.00

FRANCES H. ROSE

SCHEDULE D

Real Estate Owned

11 Jessamine Place Hilton Head Island, South Carolina	$ 350,000
1/12 undivided interest in house and property on Jupiter Island, Florida	$ 133,000

FRANCES H. ROSE

SCHEDULE E

Mortgage payable

Atlantic Savings Bank - Mortgage in the amount of $125,000 at 8.5% for 15 years. This mortgage covers the residence at 11 Jessamine Place, Hilton Head Island, South Carolina 29928.

KATHERINE C. ROSE

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks		Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	
Listed securities—add schedule A	203,064.40	Notes payable to relatives	
Unlisted securities—add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others *	5,166.60	Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	
Real estate owned—add schedule		Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property			
Cash value—life insurance			
Other assets—itemize:			
Contract Timber Interest	714.44		
		Total liabilities	None
		Net worth	208,945.44
Total assets	208,945.44	Total liabilities and net worth	208,945.44

CONTINGENT LIABILITIES	None	GENERAL INFORMATION	
As endorser, comaker or guarantor	N/A	Are any assets pledged? (Add schedule.)	No
On leases or contracts	N/A	Are you defendant in any suits or legal actions?	None
Legal Claims	N/A	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	N/A		
Other special debt	N/A		

* October 18, 1985 loan to MER Corporation at 10% interest per annum.

KATHERINE C. ROSE

SCHEDULE A

Alex. Brown Tax Free Cash Reserves, Inc.	$ 51,124.40
31 Berkshire Hathaway	120,590.00
200,000 Douglas AZ HFC MTG REV 11.5% DTD 9/1/82 Due 12/01/2005	31,350.00

WILLIAM SHEPARD ROSE III

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks		Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	
Listed securities—add schedule A	193,522	Notes payable to relatives	
Unlisted securities—add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others *	5,166 60	Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	
Real estate owned—add schedule		Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property			
Cash value—life insurance			
Other assets—itemize:			
Contract Timber Interest	714 44		
		Total liabilities	None
		Net worth	199,403 04
Total assets	199,403 04	Total liabilities and net worth	199,403 04
CONTINGENT LIABILITIES	None	**GENERAL INFORMATION**	
As endorser, comaker or guarantor	N/A	Are any assets pledged? (Add schedule.)	No
On leases or contracts	N/A	Are you defendant in any suits or legal actions?	None
Legal Claims	N/A	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	N/A		
Other special debt	N/A		

* October 18, 1985 loan to MBR Corporation at 10% interest per annum.

WILLIAM SHEPARD ROSE III

SCHEDULE A

Alex. Brown Tax Free Cash Reserves, Inc.	$ 49,362.
29 sh. Berkshire Hathaway	112,810.
200,000 Douglas AZ HFC MTG REV FHA 11.5% DTD 9/1/82 Due 12/01/2005	31,350.

WHITAKER BOYKIN ROSE

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks		Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	
Listed securities—add schedule A	126,667	Notes payable to relatives	
Unlisted securities—add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others *	5,166.60	Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	
Real estate owned—add schedule		Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property			
Cash value—life insurance			
Other assets—itemize:			
Contract Timber Interest	714.44		
		Total liabilities	None
		Net worth	132,548.04
Total assets	132,548.04	Total liabilities and net worth	132,548.04
CONTINGENT LIABILITIES	None	**GENERAL INFORMATION**	None
As endorser, comaker or guarantor	N/A	Are any assets pledged? (Add schedule.)	No
On leases or contracts	N/A	Are you defendant in any suits or legal actions?	None
Legal Claims	N/A	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	N/A		
Other special debt	N/A		

* October 18, 1985 loan to MBR Corporation at 10% interest per annum.

WHITAKER BOYKIN ROSE

SCHEDULE A

Alex. Brown & Sons Tax Free Cash Reserve, Inc.	$ 37,197.
23 Sh. Berkshire Hathaway	89,470.

AFFIDAVIT

I, William S. Rose, Jr., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

November 9, 1987
(DATE)

William S. Rose, Jr.
(NAME)

(NOTARY)

My Commission Expires March 14, 1990

32000572422 IRJ
M ROSE JR
3188 PRINCETON AVE
CINCINNATI
OH 45226

VOLUME 47 • NUMBER 5
COMPLETE TABLE OF CONTENTS • PAGE 257
INDEX TO CURRENT CASES • COVER 3

THE JOURNAL OF Taxation

A NATIONAL PROFESSIONAL JOURNAL OF CURRENT NEWS AND COMMENT FOR TAX PRACTITIONERS

Current strategies for using lifetime gifts to reduce total estate and gift taxes

by Leo C. Hodges · 266

Post-1977 planning to use NOL carryovers in corporate acquisitions

by George Brode, Jr. · 258

Problems created by CA-7 decision that pension plan participation is a security

by Daniel Alef and George G. Short · 282

NEW DEPARTMENT

Private Letter Rulings 306

Competent authority: A practical approach to double taxation relief
by J. Schuster & M. Fichtenholz ..288

Increasing investment tax credit benefits to Subchapter S corp.
by Kenneth H. Heller 274

Is IRS about to renew its attack on treatment of illegal allowances?
by William S. Rose, Jr. 298

When are trade show revenues unrelated business income?
by Mark B. Weinberg 294

New T & E audit guidelines issued by IRS 300

Many charitable remainder trusts need amending to qualify 270

Partnership share received for property and not for services 280

Major purchases by child can cost exemption 314

IRS agents not personally liable for seizure 308

Stock appreciation rights may be subject to restriction 306

Pre-'76 losses do not reduce "at risk" basis 314

Government trapped by rules governing Form 872-A 319

ALL TAX DECISIONS, COURT ACTIONS, REVENUE RULINGS ISSUED EACH MONTH ARE SUMMARIZED IN THE DEPARTMENT COVERING THE POINT AT ISSUE

November 1977

298 • *The Journal of Taxation* • *November 1977*

NEW DEVELOPMENTS IN TAX ASPECTS OF
Accounting
EDITED BY PETER ELDER, CPA, & T. MILTON KUPPER, CPA

Is IRS about to renew its attack on the treatment of illegal price allowances?

by WILLIAM S. ROSE, JR.

While the Tax Court views illegal price allowances as required adjustments in computing the actual sales price, the Service in Rev. Rul. 77-244 *and in its recent nonacquiescence to* Pittsburgh Milk Co. *is again arguing that they are nondeductible business expenses. This article analyzes the area which may see further litigation.*

PRIOR TO THE TAX REFORM ACT of 1969, the IRS had for many years, with varying degrees of success, disallowed on public policy grounds the deduction of certain business expenses which otherwise would have qualified as "ordinary and necessary expenses." The Service had fared better in the lower courts than in the Supreme Court as the Supreme Court had disallowed only two types of business expenses under the public policy theory—expenses to influence legislation[1] and fines paid to a state government.[2] In all other cases before the Supreme Court where the IRS urged that a business expense should be disallowed under public policy doctrine, the Government lost.[3]

Within the context of the IRS's use of the public policy doctrine to deny deductions or adjustments to income, an interesting and important line of cases, beginning with *Pittsburgh Milk Co.*,[4] 26 TC 707 (1956) arose in which the Tax Court found the Service's public policy argument to be inapplicable. At issue in these cases was whether a taxpayer could, in determining gross income, subtract from gross sales certain illegal "price allowances." While the court in each case focused mainly on the tax effect of price allowances and not on the deductibility of business expenses, the Service nevertheless couched its litigating position in terms of whether certain business deductions should be disallowed for public policy reasons.

Illegal price allowances

The key to understanding the tax consequences of illegal price allowances lies in understanding the *Pittsburgh Milk Co.* case. The case involved a taxpayer (a corporation) which sold, both at wholesale and retail, milk and other dairy products. The taxpayer was licensed to operate as a milk dealer under the Milk Control Law of Pennsylvania. Under this law, a fixed minimum wholesale and retail price was placed on milk and other dairy products. The taxpayer made allowances, discounts, or rebates to certain purchasers of its milk, in willful violations of both the Milk Control Law and the minimum price orders of the Milk Control Commission. These allowances were made by the taxpayer pursuant to informal agreements which it had with certain of its customers. The agreements were entered into for the purpose of avoiding the provision of the Milk Control Law. As to each such customer, the amount of the allowance was computed by applying a specific percentage to the list prices fixed by the Milk Control Commission, so as to result in a net cost to the customer which was below the Milk Control Commission's established list prices.

The allowances were handled so that each customer was billed for and paid the total amount of the billing that showed in his account. When the payment was received from the customer, it was debited to "Cash" and credited to the account receivable maintained for such customers. At the end of each month, the accounting personnel reviewed the monthly accounts receivable totals and sales totals, and from such review prepared a voucher, which set forth the computation of the aggregate amount of allowances to be made for the month. Upon completion of the monthly computation, the taxpayer debited advertising expenses and credited accrued advertising. It was out of the advertising account that checks were issued to third persons who in turn made checks payable to the appropriate milk buyers who had previously agreed with the taxpayer to purchase milk below the list price.

In the Tax Court, the taxpayer primarily argued that the discount, rebate or price allowance should be given effect by reducing gross sales on the theory that the milk actually was sold for agreed net prices. The taxpayer alternatively argued that such allowances should be recognized as deductions from gross income, for ordinary and necessary business expenses in the nature of advertising expenses. The Service rejected these arguments and contended that the milk was sold for the list prices fixed by the Milk Control Commission because the list prices were used in entering the sales on taxpayer's books. As such, the allowances should not be given effect unless they qualify as deductions from gross income and they should not be recognized as deductions because they would frustrate a sharply defined public policy of Pennsylvania.[5]

In deciding the issue of whether the allowances, rebates, or discounts, should be given effect in computing taxable income, the Tax Court in *Pittsburgh Milk* analyzed the problem based on five fundamental principles; (1) that under the 16th Amendment and the Code, income tax is imposed only on "income," and not upon every conceivable type of receipt; (2) that income derived from the sale of property is computed with respect to "the amount realized" and the amount realized must be based on the actual price or consideration for which the property was sold; (3) that gains are taxed irrespective of whether the transaction is legal or illegal,[6] (4) that no more than the actual gross income can be subjected to income tax;[7] (5) and finally, that the actual facts and not bookkeeping entries, control the determination of taxable income.[8]

The Tax Court found as a fact that the milk was not sold at the list prices fixed by the Milk Control Commission, but rather for net prices which resulted from reducing these list prices by certain allowances computed at specific rates fixed by prior agreements with custom-

ers. The court went further and analogized the circumstances to the situation where goods are sold at a catalog list price, less a trade discount of specified percentage.[9] In further support of its analysis, the court noted that Form 1120 (U. S. corporation income tax return) allows for a reduction of "gross sales" by "returns and allowances."

As to the Constitutional and accounting issues, the court stated that irrespective of the legality or illegality of the transactions, the gain or profit resulting from the sale of milk would have to be computed, for income tax purposes, by referring to the actual selling price, and not based on some greater price for which the milk might have been, but was not, sold. To this end, the court concluded that the intent of the parties as to the purpose for which allowances were made is controlling. Therefore, based on the facts, the court held that the allowances, rebates or discounts should be applied to reduce the corporation's gross sales, so as to reflect the actual agreed prices for which the milk was sold. The court did not consider whether the allowances would qualify as deductions from gross income.

The issue in *Pittsburgh Milk* was litigated by the IRS on three other occasions[10] and in each instance the Service, using the public policy argument, stated that *Pittsburgh Milk* was in error. The Tax Court in each case found the Service's arguments unpersuasive. Finally in 1962, the IRS acquiesced to *Pittsburgh Milk*.[11]

1969 changes

The Tax Reform Act of 1969 codified and limited the public policy doctrine in Sections 162(c), (f) and (g). Section 162(c) provides for the denial as ordinary and necessary business deductions of illegal payments to government officials or employees; other illegal payments such as bribes, "kickbacks" or other payments illegal under any law of the United States, or under any law of a state; and any kickback, rebate or bribe under Medicare and Medicaid. Section 162(f) provides for the denial as ordinary and necessary business deductions of fines and penalties for the violation of any law. Lastly, Section 162(g) provides that no deduction shall be allowed for ⅔rds of treble damage payments under the Antitrust Laws.

Although Congress codified and limited the public policy doctrine as to deductions, there remained a loophole under which taxpayers could do indirectly what they could not do directly. Without taking a deduction under Section 162, a taxpayer could reduce gross income by increasing his cost of goods sold by the illegal bribe, kickback or other illegal payment under Sections 61 or 471. The taxpayer could thus increase his cost of goods sold by the "price allowance" and effectively reduce his gross income by an amount which otherwise would have been a deduction. Therefore, in order to avoid the circumvention of Section 162, the Service amended Reg. 1.61-3 and Reg. 1.471-3 to state that the cost of goods sold cannot be increased by those items which would not be deductible under Sections 162(c), (f) or (g).

It is clear that Sections 162(c), (f) and (g) do not alter the accounting treatment prescribed in *Pittsburgh Milk Co.* This is true because that decision is premised on the holding that the "price allowance" was a reduction of the legal purchase price and was not a "deduction". Since Section 162 deals only with "deductions" it is inapplicable to illegal "price allowance" situations.

It has been suggested that the language, "other illegal payments", in Section 162(c)(2) could be used to deny an illegal price allowance in determining gross income. This argument is without much substance as a price allowance, whether legal or illegal, is neither a payment nor a deduction. Accordingly, it would seem that price allowances are unaffected by Section 162.

Further support for the view that the 1969 Act did not affect the holding in *Pittsburgh Milk* is found in S. Rep't. No. 91-552 91st Cong., 1st Sess. 273 (1969) wherein it is stated:

"The Finance Committee bill codifies the court position that deductions are not to be allowed for fines or similar penalties paid to a government for the violation of any law. The bill also denies deductions for three other types of expenditures . . . deductions for bribes to public officials and other unlawful bribes or 'kickbacks'. The codification of the rule denying deductions for payments in these situations which are deemed to violate public policy is designed to be all inclusive. Thus public policy generally will not be deemed to be sufficiently clearly defined in other circumstances to justify disallowances of deductions."

The Congressional intent is further supported by TD 7345 (filed 2/19/75)

[*William S. Rose, Jr., of the Ohio, South Carolina and D. C. Bars, is associated with the Cincinnati law firm of Frost & Jacobs. Mr. Rose is Co-chairman, Subcommittee on Income and Deductions, Tax Accounting Committee, Tax Section, ABA. He has previously written for* Taxes *magazine.*]

and *Rev. Rul.* 74-323, 1974-2 CB 40, both of which acknowledge that the 1969 Act's changes to Section 162 which deny deductions for payments in violation of public policy are designed to be all-inclusive. As such, the codification of the public policy doctrine precludes the Service from using that doctrine in circumstances other than those involving deductions covered by Section 162.

Conclusion

Although the 1969 Act did not affect the holding of *Pittsburgh Milk Co.*, it is important to reiterate the two principal reasons why, other than Congress' silence on the subject, the case remains a viable decision. First, the 16th Amendment and the Code state that income tax is imposed only on income and not on capital. Second, the amount realized from the sale of property must be based on the actual price for which property is sold. Therefore, if an item of property is sold for $9, the Service cannot maintain that the property was sold at $10 because the lower $9 price was illegal under the law.

It should be noted, however, that the Service has within the last year withdrawn its acquiescences in *Pittsburgh Milk Co.* and *Atzigen-Whitehouse Dairy, Inc.*, 36 TC 173 (1961). In addition, in *Rev. Rul.* 77-244, IRB 1977-29, 8, involving a factual situation which is similar if not identical to *Pittsburgh Milk*, the Service has recently stated that illegal price allowances are illegal pay-

[9] *Commonwealth*, 384 U.S. 698 (1966); *Textile Mills Corp.*, 314 U.S. 326 (1941).

[10] *Tomah Trunk Rentals, Inc.*, 384 U.S. 30 (1966); *Hoover Express Co.*, 384 U.S. 30 (1966). *Helvering*, 320 U.S. 687 (1943); *Lilly*, 343 U.S. U.S. 90 (1952); *Tellier*, 383 U.S. 687 (1966).

[11] *Riverdale Dairy Company, Inc.*, TCM 1967-343; *Harmony Dairy Co.*, TCM 1966-100; *Atzigen-Whitehouse Dairy, Inc.*, 36 TC 173 (1961).

[8] See *Tomah Trunk Rentals, Inc.*, supra note 2.

[9] See *Sullivan*, 274 U.S. 259 (1927).

[7] See *Sullivan*, 11 TC 1098 (1948).

[8] See *Mitchel Bros. Co.*, 247 U.S. 179 (1918) and *Northwestern States Portland Cement Co.*, 138 F.2d 196 (CA-8, 1943).

[9] See *American Lace Mfg. Co.*, 8 BTA 419 (1927); *American Cigar Co.*, 21 BTA 484 (1930); *Boehm, Jr.*, BTC 488 (1948).

[10] See the cases cited at note 4, supra.

[11] 1962-2 CB 8. The IRS had previously acquiesced to *Atzigen-Whitehouse Dairy, Inc.*, supra note 4.

ments within the meaning of Section 162(c)(2) and may not be subtracted from gross sales to determine gross income. The rationale for the result in *Rev. Rul.* 77-244 lies ostensibly in the provisions of Reg. 1.61-3(a) which states that gross income is determined without subtraction of amounts that are of a type for which a deduction would be disallowed under Section 162(c), (f) and (g).

Rev. Rul. 77-244 may suffer from the misconception that *Pittsburgh Milk Co.* involves a deduction or a payment which would be applied to reduce gross sales (cost of goods sold) rather than the determination of what constitutes the true selling price of an item of property.

The withdrawn acquiescence and the issuance of *Rev. Rul.* 77-244 may be a signal to tax practitioners that the issue which was settled for more than ten years may soon be relitigated by the Commissioner. ☆

New T&E audit guidelines issued by the Service

RECENTLY RELEASED GUIDELINES for IRS agents examining T&E deductions stress the need for the taxpayer to establish the business connection of the expense. The guidelines, contained in IRM Section 4231 (Audit Technique Handbook), Subsection 67(13), instruct examiners to consider the materiality of the questioned items in relation to the size, nature, and location of the business, as well as prior audit results and T&E practices of the taxpayer's industry. Particular stress is given to techniques to insure that personal expenses are not being charged off as business items.

In the area of travel expense deductions, the business purpose served by the individuals incurring the expense will be scrutinized.

For entertainment expenses, the Agent is instructed to require strict substantiation in situations involving the use of credit cards by officer-shareholders and their relatives. Examiners will pay particular attention to deductions for airplanes, yachts, vacation cottages, hunting lodges, and similar items. The Manual recommends examination of the monthly statements of country, golf, or social clubs, obtaining them from the organization itself, if the taxpayer's copies are not available.

The commingling of gifts and other T&E expenses is warned against in the Manual which goes on to note that no deduction is allowable for gift purchases that are still on hand at the end of the taxpayer's year.

Rev. Rul. 76-453 suspended

On another T&E related point, the Service has just suspended the controversial Ruling, *Rev. Rul.* 76-453, 1976-2 CB 86 was to become effective 10/1/77), which would have denied a deduction for the cost of travel from a taxpayer's home to his temporary job site (see *No more deductions for costs of commuting to temporary job, says Service*, 46 JTAX 125 (February, 1977)). Rather than bring about this change (on which there has been continuous flak) via a Ruling, the Service will now try to bring it about via Proposed Regulations on which those affected will have an opportunity to comment. ☆

New accounting decisions this month

CAPITAL GAINS

Transfer of patent rights did not qualify for capital gains treatment. *(TC)*

Taxpayer, an owner of certain patents, granted patent rights within a specified geographical area, and retained rights as to all other geographical areas. The royalty payments received pursuant to the agreement were reported as capital gains, and the Commissioner determined they were taxable as ordinary income.

Held: For the Commissioner. A transfer of all patent rights within a specified geographical area does not automatically qualify as a transfer of "all substantial rights" to a patent within the meaning of Section 1235. In addition, the taxpayer has failed to establish that the geographical transfer disposed of "all substantial rights" to the patents. *Kueneman*, 68 TC No. 30.

Proceeds from transfer of patent application taxed as ordinary income. *(DC)*

The Government contended proceeds received by taxpayer from the transfer of a patent application to her wholly-owned corporation should be taxed as ordinary income, not capital gain where the transfer took place five months after notice of allowance was received from the U. S. Patent Office and the patent was granted only three months after the transfer.

Held: For the Government. *Myers*, DC Cal., 7/14/77.

Relatives' holding period could not be tacked on to taxpayer's period. *(DC)*

The Commissioner held that taxpayer was not entitled to long-term capital gain on the disposition of certain securities which taxpayer had purchased from relatives pursuant to an existing right to purchase agreement with the relatives. Taxpayer argued that his holding period should include the time the securities were held by the relatives because of the existence of the right to purchase agreement.

Held: Against taxpayer. The benefits of ownership remained with the relatives until taxpayer's purchase. *Stanley*, DC Miss., 6/17/77.

Indemnity losses were capital losses. *(CA)*

Taxpayers sold their corporate interests to an unrelated third party and reported such sale as a capital gain. Taxpayers also agreed to indemnify X if corporate earnings did not reach a certain level. Indemnification losses, claimed by taxpayers in a subsequent year, were characterized by taxpayers as ordinary losses while the Commissioner held them to be capital losses. The Tax Court found for the Commissioner.

Held: Affirmed. The character of the losses must be determined by reference to the character of the original gain on the disposition of the corporate interest. *Federal Bulk Carriers Inc.*, CA-2, 7/19/77.

Profits on sales by developer held capital gains. *(Ct. Cls.)*

On the facts, the court held certain sales by a real estate developer qualified for capital gain treatment while other sales did not. *Cousins Properties*, Ct. Cls., 7/1/77.

DEPRECIATION

Investment credit for foreign manufactured property disallowed. *(TCM)*

Taxpayer disputed the fact that he had ordered the construction of a steamship from a Canadian corporation at a time when the investment tax credit on foreign goods was suspended.

Held: For the Commissioner. *Maid of the Mist Corporation*, TCM 1977-265.

Portion of football franchise allocable to players' contracts was depreciable. *(CA)*

Warren Jones Co.: The Ninth Circuit Distills the Legal Quagmire of Code Sec. 1001(b)

By WILLIAM S. ROSE, JR.

Reprinted from the July, 1976 issue of
TAXES—*The Tax Magazine*
Published and Copyrighted 1976 by
Commerce Clearing House, Inc., Chicago, Illinois 60646
All Rights Reserved

Warren Jones Co.: The Ninth Circuit Distills the Legal Quagmire of Code Sec. 1001(b)

By WILLIAM S. ROSE, JR.*

The author, an attorney with the Office of Chief Counsel, IRS, Washington, D. C., discusses the Ninth Circuit Court's decision in *Warren Jones Co.*, a major step, he believes, in resolving the problems in the deferred payment sales of property area.

THE SALE OR EXCHANGE OF PROPERTY on a deferred payment method is an everyday occurrence. Yet its treatment for federal income taxes has been so varied that a veritable legal quagmire has been created from which extraction is often impossible. Sometimes the only lifeline from the possible harsh results of falling into the quagmire has been the effect of reporting the realized gain from the sale or exchange on the installment method.[1] Notwithstanding the possibilities of the installment method, it appears that finally the quagmire of deferred payment sales of property might be resolved by the recent Ninth Circuit's decision in the case of *Warren Jones Co. v. Commissioner*.[2] However, before examining the Ninth Circuit's decision and its effect, an historical perspective of deferred payment sales of property is essential.

Pre-Warren Jones

Prior to *Warren Jones*, in a deferred payment sale of property, the form of the promise to pay and the method of accounting regularly used were important in determining the most suitable and advantageous method of reporting gain.

Generally, a cash basis taxpayer recognizes gain when he receives, or constructively receives, cash or its equivalent.[3] Originally, the provisions for determining gain on sales of property required that the property (note or contract right) received "be treated as the equivalent of cash to the amount of its fair market value if any."[4] This language presumed that all sales of property resulted in immediate recognition of

*The views expressed herein are those of the author and not necessarily those of the Internal Revenue Service.

[1] Code Sec. 453.

[2] 75-2 USTC ¶9732, 524 F. 2d 788 (CA-9), rev'g CCH Dec. 32,078, 60 TC 663.

[3] Treas. Reg. Sec. 1.446-1(c)(1)(i).

[4] Revenue Act of February 24, 1919, Ch.18, Sec. 202(b) (40 Stat. 1060).

gain and all transactions were "closed." [6] In 1921 Congress altered the provisions to avoid the above result by providing that "no gain or loss shall be recognized unless the property received in exchange has a readily realizable market value." [7] The thrust of the language used was that if the property was not capable of being immediately converted into cash the property would escape immediate recognition. In 1924, Congress again changed the language of the statute to read as Code Section 1001 reads today.[8]

The present statutory approach, since 1924, has been to include in the amount realized from the sale the fair market value of the property received. Although the intent of Congress was ostensibly to equalize tax treatment of cash and accrual basis taxpayers in deferred payment sales of property, the courts have interpreted Congressional intent otherwise. To intensify the dilemma the courts have put emphasis as to the recognition of gain by focusing on the accounting method used by the taxpayer.[9]

For the taxpayer who is on the cash basis method of accounting, taxable gain results only if the promise to pay has a fair market value.[9] If the property (other than money—Section 1001 (b)) has no fair market value, that is, no ascertainable fair market value, the Regulations state that Section 1001 cannot be applied and recognition of gain is deferred.[10]

Beginning with the case of *Dudley T. Humphrey*,[11] the Board of Tax Appeals, the predecessor of the Tax Court, ignoring the fact that Congress in 1921 had altered the provisions of Section 202(b) (Revenue Act of February 24, 1919), held that when a taxpayer sells a partnership interest for nonnegotiable notes providing for payment in a subsequent year, the promise to pay in the future is merely evidence of indebtedness and is not equivalent to cash. The court never considered the statutory history of Section 202(b) and thus gave birth to the "cash equivalence" line of cases.

Burnet v. Logan [12] is the celebrated case which, to many taxpayers holding obligations that have no ascertainable value, carved out an exception to the recognition of gain in the year of receipt. The case establishes the rule of deferring the recognition of gain until the seller has recovered his basis in the property sold. The result of this holding is to allow substantially similar transactions the "open method" which entitles the taxpayer to recover his basis fully and report the excess as capital gain.[13]

In the case of *Nina J. Ennis*,[14] taxpayer received the vendee's nonnegotiable contractual obligation on the sale of property. The Tax Court held

[6] Closed transaction: seller recognizes entire gain in the year of sale.

[7] Revenue Act of November 23, 1921, Ch. 136, Sec. 202(c) (42 Stat. 256).

[8] Revenue Act of June 2, 1924, Ch. 234, Sec. 202(c) (43 Stat. 256)—"The amount realized . . . shall be the sum of any money received plus the fair market value of the property (other than money) received."

[9] See *Harold W. Johnston*, CCH Dec. 17,578, 14 TC 560 (1950). Note also that neither Sec. 446, nor the Regulations thereunder, dictates that a transaction cannot have the same result for both cash and accrual method taxpayers.

[9] Sec. 1001(b).

[10] Treas. Reg. Sec. 1.1001(a). See also *Burnet v. Logan*, 2 USTC ¶736, 283 U. S. 404 (1931); Rev. Rul. 58-402, 1958-2 CB 15.

[11] CCH Dec. 8913, 32 BTA 280 (1935).

[12] Case cited at footnote 10.

[13] See, further, *Commissioner v. Carter*, 48-2 USTC ¶9415, 170 F. 2d 911 (CA-2), aff'g CCH Dec. 16,015, 9 TC 364 (1947), acq. 1958 CB 4; *Westover v. A. Smith*, 49-1 USTC ¶9189, 173 F. 2d 90 (CA-9); *J. C. Bradford*, CCH Dec. 20,511, 22 TC 1057 (1954), acq. 1958-2 CB 4; *George Lentz*, CCH Dec. 22,567, 28 TC 1157, acq. 1958-2 CB 6; *Pat O'Brien*, CCH Dec. 21,355, 25 TC 376 (1955), acq. in part, 1957-1 CB 4.

[14] CCH Dec. 18,543, 17 TC 465 (1951), nonacq. 1956-2 CB 10.

that the obligation could not be considered equivalent to cash because it was nonnegotiable and in order to be equivalent to cash the obligation must have been able to "readily pass from hand to hand in commerce." The same contract came before the Tax Court in the case of *Est. of Clarence W. Ennis*.[15] On this occasion the court decided that a vendee's nonnegotiable contractual obligation to pay in the future could "pass from hand to hand in commerce" but held that on the facts the contract had no fair market value. The court's finding that the contract was readily marketable but had no fair market value advanced no logic.

It appeared that finally, in the case of *Frank Cowden, Sr.*,[16] the Tax Court came around to the view that most contract rights or notes, whether or not negotiable, have a fair market value. However, in the case of *Western Oaks Building Corp.*,[17] the Tax Court reiterated its former position that an obligation could not be equivalent to cash unless it was negotiable.

The general rule regarding the inclusion of items of gross income for accrual method taxpayers, which has differed from that described above with respect to cash basis taxpayers, is found in Section 451(a) wherein it is stated that:

"The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period."[18]

This general rule had its origin in *Spring City Foundry Co. v. Commissioner*,[19] wherein the Supreme Court stated that: "It is the right to receive and not the actual receipt that determines the inclusion of the amount in gross income. When the right to receive an amount becomes fixed, the right accrues." *Spring City Foundry* dealt with the accruability of an account receivable arising out of a sale of merchandise, when the purchase price was immediately due and payable but the actual payment was postponed. The Supreme Court thus determined that it was proper to include the amount of the account at full face value since the right to payment had accrued at the time of sale. Any questions as to the uncollectibility were to be resolved through the application of the appropriate statute governing deductions. Although *Spring City Foundry* dealt specifically with accounts receivable, the case nonetheless has been cited as controlling authority for immediate accrual at face value of installment obligations in deferred payment sales of property by accrual method taxpayers.

Warren Jones

The facts in *Warren Jones* are that in 1968 the taxpayer, a cash method taxpayer, sold an apartment building for a total price of $153,000, receiving a down payment of $20,000 and a contract calling for monthly installments of $1,000. The contract provided for interest on the unpaid balance at 8 per cent. The unpaid balance was payable at the end of 15 years. During the year of sale, taxpayer received payment totaling $24,000 of which $20,457 was allocable to principal. Upon receiving full payment the taxpayer was to execute and deliver a warranty deed to the property. The

[15] CCH Dec. 20,844, 23 TC 799 (1955), nonacq. 1956-2 CB 10.

[16] CCH Dec. 23,670, 32 TC 853 (1959), rev'd and rem'd 61-1 USTC ¶ 9382, 289 F. 2d 20 (CA-5), on remand CCH Dec. 24,979(M), 20 TCM 1134 (1961).

[17] CCH Dec. 28,819, 49 TC 365 (1967), nonacq. 1968-2 CB3.

[18] See also Treas. Regs. Secs. 1.451-1(a) and 1.446-1(c)(1)(iii).

[19] 4 USTC ¶ 1276, 292 U. S. 182 (1934).

buyer took possession of the apartment building as of the closing date.

On his return in 1968, taxpayer reported no gain from the sale, stating:

"Taxpayer reports income and expenses on the cash method of accounting, and, in accordance with *Nina J. Ennis* . . ., no profit is realized until the basis of property sold has been recovered . . . if it is ultimately determined that the taxpayer is not entitled to use the recovery of cost method of accounting for the sale, then taxpayer hereby elects to use the installment method of reporting. . . ." [20]

The only evidence of indebtedness associated with this transaction was the real estate contract. No notes, securities or other instruments were delivered to petitioner. In the Statutory Notice of Deficiency, the Commissioner gave effect to petitioner's conditioned election of Section 453 and included a portion of the gain in petitioner's 1968 income, computed with reference to Section 453. At trial, the Commissioner introduced affirmative evidence showing that real estate contracts of the type entered into by petitioner are and were regularly bought and sold in the Seattle, Washington area and that there were funds available for investment in such contracts. The Tax Court found this as a fact. The Commissioner also introduced affirmative evidence on the fair market value of the contract tending to show that its fair market value was at least $76,980 at the time of its receipt. The Tax Court also found as a fact that the fair market value was $76,980. At no point in the case did the Commissioner contend that the contract was "equivalent to cash." [21] Taxpayer argued that the contract was not equivalent to cash, relying on *Nina J. Ennis.*[22]

The Tax Court, in a majority opinion by Judge Dawson, held that the contract was not the "equivalent of cash," specifically relying on the fact that the fair market value was only 57 per cent of face value. In so holding, the Tax Court relied on the following passage from *Cowden:*[23]

"We are convinced that if a promise to pay of a solvent obligor is unconditional and assignable, not subject to set-offs, and is of a kind that is frequently transferred to lenders or investors at a discount not substantially greater than the generally prevailing premium for the use of money, such promise is the equivalent of cash and taxable in like manner as cash would have been taxable had it been received by the taxpayer rather than the obligation." 289 F. 2d at p. 23.

In a separately concurring opinion, Judge Scott agreed with the majority's result but on the narrow ground that the contract did not constitute "property (other than money)." Judge Tannenwald dissented on the ground that the fact that the contract could be sold only at a substantial discount did not require a decision that it was not equivalent to cash. Judge Tannenwald thus recognized cash equivalence as the test. Judge Quealy dissented on the ground that cash equivalence was not the test and that the only test was whether the contract had a fair market value. Judge Sterrett agreed with both dissents, which fact is surprising since the two dissents are inconsistent.

The Commissioner appealed the case to the United States Court of Appeals, Ninth Circuit. On brief, the Department of Justice, representing

[20] Case cited at footnote 2.

[21] Based on the public record it appears that the Court erred in stating that the Service so argued. *Warren Jones Co.*, 60 TC 663, 666.

[22] Case cited at footnote 14.

[23] Case cited at footnote 16.

the Commissioner, contended that the issue was a legal one and that the Code and case law mandated that the ascertainable fair market value of the property (note or contract right) be included in the taxpayer's income as a realized gain in the year of sale.[34] The case of *Burnet v. Logan*[35] was distinguished on the basis that the issue therein was that the evidence of indebtedness (property) had no ascertainable fair market value, giving rise to an open transaction, whereas in *Warren Jones* the court found that the contract right had a fair market value. *Cowden*[36] was also distinguished on the basis that it represented a solution to a constructive receipt issue rather than whether the current fair market value of the obligation to make future payments was property received by the taxpayer. The Department of Justice also illustrated on brief to the Ninth Circuit that the Tax Court in various decisions had created a quagmire as to the treatment of deferred payment sales of property.[37]

Warren Jones, as decided by the Tax Court, represents the first instance where the effect of a sizeable discount was used in treating the transaction as open despite the fact that the contract right (evidence of indebtedness) had a fair market value. This, the Commissioner contended on appeal, was erroneous in that the Tax Court opinion didn't comport with the statutory requirements of the Code. Additionally, the Commissioner contended that, since the Tax Court found as a fact that the contract right or note had a fair market value, then Section 1001(b) requires that the fair market value of the "property" be included in income in the year of receipt.[38] It was acknowledged that the above result would impose hardships on certain taxpayers in that they would have to sell the contract right or note to satisfy the tax liability. However, it was argued, for this very reason Congress enacted Section 453 to provide relief from these types of problems that arise from the realization of income under Section 1001.[39]

The Ninth Circuit agreed with the Commissioner in viewing the issue as a legal question and based its decision on a statutory analysis of Section 1001 and its prior decisional law. Thus, the Ninth Circuit noted that in 1919 the first statutory predecessor of Section 1001(b)[40] required that the fair market value of a real estate contract be included as amount realized in the taxable year of sale. Three years later, however, in 1921, Congress changed the statute to the effect that only real estate contracts with readily realizable market value would have to be realized in the year of sale.[41]

[34] Sec. 1001(b); *Heller Trust v. Commissioner*, 67-2 USTC ¶9626, 382 F. 2d 675 (CA-9); and *Gersten v. Commissioner*, 59-1 USTC ¶9303, 267 F. 2d 195 (CA-9) were cited in support.

[35] Case cited at footnote 10.

[36] Case cited at footnote 16.

[37] Thus, *Est. of Ennis*, cited at footnote 15, and *Dorsey v. Commissioner*, CCH Dec. 28,876, 49 TC 606, were cited as authority to show that the "ascertainable" fair market value test was sometimes used. At other times the "marketability" test was used as in *MacDonald v. Commissioner*, CCH Dec. 30,665, 55 TC 840 (1971). Moreover, at other times the purported "cash equivalency" test was used as in *Ennis v. Commissioner*, cited at footnote 14, and *Western Oaks Building Corp. v. Commissioner*, CCH Dec. 28,819, 49 TC 365 (1968). Finally, it was noted that the Tax Court had used several of the purported tests together as in *Johnston*, cited at footnote 8.

[38] This finding, it was argued, was supported by the fact that (1) there was an established market for such and similar contracts, (2) the obligor was solvent, and (3) there were no uncertainties as to the time or the amount of the payment.

[39] See *Burnet v. S & L Bldg. Corp.*, 3 USTC ¶1064, 288 U. S. 406 (1933).

[40] Revenue Act of February 24, 1919, Ch. 18, Sec. 202(b).

[41] Revenue Act of February 23, 1921, Ch. 136, Sec. 202(c).

Notwithstanding the 1921 change, Congress in 1924 again changed the statute with what now appears in Section 1001(b).[32] Accordingly, the Ninth Circuit reasoned, by explicit action, Congress eliminated the "readily realizable market value" test established in 1921. In effect, therefore, the Ninth Circuit accepted the Commissioner's contention that where income is realized in the form of property, the measure of the income is the fair market value of the property at the date of its receipt.[33] The Ninth Circuit additionally reinforced the above statutory analysis by inquiring into the purpose of the enactment of Section 453[34] which was ". . . to relieve taxpayers who adopted it (Section 1001) from having to pay an income tax in the year of sale based on the full amount of anticipated profits when in fact they had received in cash only a small portion of the sales price.[35]"

As stated above, the Ninth Circuit also relied on its prior decisional law. Thus, it relied on its recent decision, *In re Steen*,[36] wherein it held that the fair market value of an installment payment contract received in exchange for shares of stock was ascertainable and that the fair market value was an amount realized in the year of sale. Reliance was also placed on *Heller Trust*,[37] in which it had affirmed the Tax Court, requiring that a taxpayer include the fair market value of real estate contracts as an amount realized in the year of sale, even though the fair market value of the contracts involved was only 50 per cent of the face value.[38]

It is interesting to note that the Ninth Circuit's opinion in *Warren Jones Co.* is the first case, since the enactment of the present version of Section 1001, in which a court has analyzed the statutory history and construction of the latter Code section. Although there are cases where the result is consistent with the requirements of Section 1001,[39] since its enactment in 1924, it is curious that it took 52 years for a court to analyze the statutory meaning of Section 1001 (b). This observation is especially baffling in light of the fact that deferred payment sales of property is an everyday occurrence. The importance of the Ninth Circuit's opinion in *Warren Jones*, however, is not only that it represents an appellate decision which might bring order out of a confused state of the law in deferred payment sales of property, but that the Commissioner contended for the position adopted by the Ninth Circuit. The fact that the Commissioner now has a recognizable position will certainly have the salutary effect of bringing some guidance to the tax practitioner in advising his clients.

The Appellate Court's opinion in *Warren Jones*, however, has not solved all of the issues in the deferred payment sales of property area. Despite the Ninth Circuit's opinion in *Warren*

[32] Revenue Act of June 2, 1924, Ch. 234, Sec. 202(c).

[33] See H. Rept. 179, 68th Cong., 1st Sess. 1924.

[34] H. Rept. 413, 91st Cong., 1st Sess. 107-08 (1969).

[35] In further support of this conclusion the Ninth Circuit cited *Commissioner v. South Texas Lumber Co.*, 48-1 USTC ¶ 5922, 333 U. S. 496. For further analysis of the statutory history of Sec. 1001 see Haley, "The Application of Section 1001 to Deferred Payment Sales of Property," 28 *Tax Lawyer* 303 (1975).

[36] 75-1 USTC ¶ 9199, 509 F. 2d 1398 (CA-9).

[37] Case cited at footnote 24.

[38] See further *Clodfelter v. Commissioner*, 70-1 USTC ¶ 9413, 426 F. 2d 1391 (CA-9); *Tombari v. Commissioner*, 62-1 USTC ¶ 9261, 299 F. 2d 889 (CA-9); *Gerstell v. Commissioner*, cited at footnote 24; *McCormac v. United States*, 70-1 USTC ¶ 9345, 424 F. 2d 607 (Ct. Cls.); *Kaufman v. Commissioner*, 66-2 USTC ¶ 9756, 372 F. 2d 789 (CA-4); *Campagna v. United States*, 61-1 USTC ¶ 9458, 290 F. 2d 682 (CA-2).

[39] See citations in footnote 38.

96-183 O - 89 - 27

Jones, a uniform test in the various courts does not exist in determining when a deferred payment obligation constitutes an "amount realized," and therefore the potential for abuse still exists. For example, a taxpayer who sells property, receiving in return a deferred payment obligation, might not report any gain at all in the year of sale, intending to recover his basis (*Burnet v. Logan*). If he is audited by the Service within the period of limitation, he can claim that the obligation was not "cash equivalent" or does not have an ascertainable fair market value and that the gain is not to be reported until the payments are received.[40] If he is unsuccessful in his contention he may under certain circumstances still elect Section 453.[41] However, because of the uncertainty of the treatment of the transaction and the efforts of taxpayers to minimize their taxes the potential for abuse is great. An illustration is a situation where a taxpayer is audited after the statute runs out the year of the sale and claims, in accordance with Service position, that the gain was recognized in the year of sale.[42] Apart from the illustrated abuse, however, is the significant issue of whether a taxpayer who erroneously treats payments on the deferred payment sale method and recovered his basis before reporting any gain may elect the installment method provided by Section 453.[43]

The Commissioner's position originally was that the installment method must be elected on a timely filed return.[44] After losing numerous cases,[45] however, the Commissioner modified his position. In T. I. R. 756 (Aug. 24, 1965), subsequently published as Rev. Rul. 65-297, 1965-2 CB 152, the Commissioner announced that the IRS would recognize, as valid, elections made under the following circumstances:

"(1) Those cases where the sale took place in a taxable year ended before December 18, 1958 (the date the present regulations were effective) if the election was made on the return for the year the first payment from the sale was received.

"(2) Those cases where the election was made on an amended return for the year of sale not barred by the statute of limitations or the operation of any other rule of law if the facts indicate that no election inconsistent with the installment election had been made with respect to the sale.

"(3) Those cases where the election was made on a delinquent return for the year of sale."

Additionally, the revenue ruling requires that the taxpayer's failure to exercise the installment election in a timely return also must have been in good faith. In conclusion, the revenue ruling stated that the foregoing criterion for election of the installment method should only be recognized pending the issuance of a new Regulation under Section 453.[46]

It is under the second set of circumstances in the ruling that the courts[47] and the Commissioner[48] have allowed taxpayers similarly situated as in *Warren Jones* to elect at any time up to and through trial the installment method. It appears that the legal basis for such a rule is the recognition by the Commissioner that the recovery of basis

[40] *Burnet v. Logan*, cited at footnote 10.

[41] Only if the taxpayer can come within the 30% rule of Sec. 453(b)(2)(A)(ii).

[42] See *Herbert S. Witte v. Commissioner*, 75-1 USTC ¶ 9477, 513 F. 2d 391 (CA-DC).

[43] During audit, through administrative appeals or at trial.

[44] Rev. Rul. 93, 1953-1 CB 82 and Rev. Rul. 56-396, 1956-2 CB 298.

[45] *Mamula v. Commissioner*, 65-2 USTC ¶ 9481, 346 F. 2d 1016 (CA-9).

[46] A proposed new Regulation would modify only Treas. Reg. Sec. 1.453-8(b).

[47] I. e., *Est. of Sam E. Broadhead*, CCH Dec. 32,170(M), 32 TCM 1047 (1973).

[48] I. e., *Warren Jones Co.*, cited at footnote 2.

approach (open transaction) in certain instances is an acceptable method of reporting gain.[49] Thus, if the recovery of basis approach is acceptable, which it is, then the subsequent Section 453 election is not inconsistent with the prior method of reporting gain. The rationale of the Commissioner in this instance appears to be that the recovery of basis approach was not allowable and not a binding election on the Service. Mutuality, therefore, requires that the taxpayer not be bound by the election.[50]

The position, as found in Rev. Rul. 65-297, has been the Service position for ten years despite the caveat therein, that new Regulations would be issued by the Commissioner. New Regulations to date have not been issued. Treating a Section 453 election pursuant to the guidelines of Rev. Rul. 65-297 is, however, not without future danger of attack, for there is a plausible argument for disallowing a Section 453 election after the due date of the return in which the transaction occurred. The argument is found in the Supreme Court's opinion in *Pacific National Co. v. Welch*,[51] wherein it was stated:

"Change from one method [deferred payment method] to the other [installment method] . . . would require recomputation and readjustment of tax liability for subsequent years and impose burdensome uncertainties upon the administration of the revenue laws. It would operate to enlarge the statutory period for filing returns . . . to include the period allowed for recvering overpayments . . . There is nothing to suggest that Congress intended to permit a taxpayer, after expiration of the time within which return is to be made, to have his tax liability computed and settled according to the other method. By reporting income . . . according to the deferred payment method, [Taxpayer] made an election that is binding upon him and the Commissioner." (304 U. S. at 194-95).

Readily discernible are the weaknesses of the above argument—that is, in many instances the deferred payment method is not acceptable nor binding upon the Commissioner and that the "recomputation and readjustment of tax liability for subsequent years" cannot be avoided even if the installment method election is denied. However, even though a contention based on the *Pacific National Co.* opinion has its weaknesses, it does have some legislative support.[52] Notwithstanding the possible argument found in *Pacific National Co.*, the present Service position, as found in Rev. Rul. 65-297, is to allow a taxpayer who used the recovery of basis approach to elect the installment method if the recovery of basis approach proves to be unacceptable to the Service.[53]

Conclusion

The Ninth Circuit's opinion in *Warren Jones* is certainly a first major step in resolving the legal quagmire of deferred payment sales of property. It will be interesting to see whether the other courts, especially the Tax Court, in cases where venue lies in other appellate jurisdictions, will adopt the Ninth Circuit's analysis of Section 1001 to bring more certainty to the taxation of promises to pay. To

[49] As discussed previously, authority for this method is the Supreme Court's decision in *Burnet v. Logan*, cited at footnote 10. However, it is not clear whether to elect the open method of reporting gain; there must be some affirmative action by the taxpayer.

[50] See further argument in *Mamula*, cited at footnote 45.

[51] 38-1 USTC ¶ 9286, 304 U. S. 191.

[52] See S. Rept. 69-52, 69th Cong., 1st Sess. 19 (1926).

[53] For cases so holding, see cases cited in Rev. Rul. 65-297, 1965-2 CB 152.

the cautious taxpayer, the method prescribed by the Ninth Circuit in *Warren Jones* of reporting gain upon the receipt of an obligation offers some certainty that the method will not be questioned by the Service. For the bold taxpayer, however, there is the alternative advanced by the petitioner in *Warren Jones*, that is, to recover basis before reporting any gain. If the latter method proves to be objectionable to the Service, because the receipt of the promise to pay has a fair market value, then the election of Section 453, if available, will certainly dilute the harshness of realizing the full fair market value of the obligation.

[The End]

SF 278 (Rev. 1/89)
FPM Chapter 734
U.S. Office of Personnel Management

Financial Disclosure Report

Form Approved
OMB No. 3209-0001

Reporting Status (Check Appropriate Box)		Agency Use Only	OGE Use Only	Date of Appointment, Candidacy, Election or Nomination (Mo., Day, Yr.)	Termination Date (If Applicable) (Month, Day, Year)
☐ Incumbent	☒ New Entrant, Nominee, or Candidate ☐ Termination Filer				

Reporting Individual's Name	Last Name: ROSE, Jr.	First Name and Middle Initial: William S.	
Position for Which Filing	Title of Position: Assistant Attorney General, Tax Division	Department or Agency (If Applicable): Department of Justice	
Location of Present Office	Address (Number, Street, City, State and ZIP Code): U.S. Department of Justice Washington, D.C. 20530		Telephone No. (Include Area Code): 633-2901
Position(s) Held With the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: None		

Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination: Senate Judiciary Committee	Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☒ No

Certification	Signature of Reporting Individual: William S Rose Jr	Date (Month, Day, Year): 11/6/87
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.		
Other Review (If desired by agency)	Signature of Other Reviewer:	Date (Month, Day, Year):
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official:	Date (Month, Day, Year):
The information contained in this report discloses no conflict of interest under applicable laws and regulations.		
Office of Government Ethics Use Only	Signature:	Date (Month, Day, Year):

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if comments are continued on the reverse side) ☐

278-1 00

NSN 7540-01-070-6444

PREVIOUS EDITION USABLE

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I (Liabilities)**—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II (Agreements and Arrangements)**—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

SF 278 (Rev. 1/89)
5 CFR Chapter XCVI
U.S. Office of Personal Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name	Assets and Income	Page Number		Schedule A
ROSE, William S. Jr.				

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets								BLOCK C Income																	BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)								Type of Income (X)							Other (Specify Type)	Category of Amount of Income (X)									Actual Amount Only If "Other" Specified	Date (Mo., Day, Yr.) Only If Honoraria	If yes, complete Schd. B Part I for those assets including those sold for a loss.	
	None (or less than $1001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000		Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust			None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
S or DC — Examples: XYZ Common			X						X							partnership income			X						$80,000		X	
Doe Jones & Smith, Hometown, USA				X																								
1 DC Alex Brown & Sons Acct. Baltimore, Md. (KCR)						X			X		Y								X Y									
--Doubleday & Co., Inc. (No longer owned)																												
--Tax-Free Cash Resv. Inc.																												
--Berkshire-Hathaway, Inc.																												
--Douglas, Az. Bond																												
--Capital Cities/ABC, Inc. (No Longer Owned)																												
2 DC Alex Brown & Sons Acct. Baltimore, Md. (WSR II)						X			X		Y							X Y										
--Tax-Free Cash Reserv., Inc.																												
--Berkshire-Hathaway, Inc.																												
--Douglas, AZ. Bond																												
--Capital Cities/ABC Inc. (No Longer Owned																		X Y										
3 DC Alex Brown & Sons Acct. Baltimore, Md. (WBR)						X			X		Y																	
--Tax Free Cash Reserv., Inc.																												
--Berkshire Hathaway, Inc. (No longer owned)																												
--Doubleday & Co. Inc.																												
--Capital Cities/ABC, Inc. (No Longer Owned)																												

278-300

PREVIOUS EDITION USABLE

SF 278 (Rev. 1/95)
FPM Chapter 735
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name	Assets and Income	Page Number	2	Schedule A
ROSE, William S., Jr.				

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets								BLOCK C Income																	BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)								Type of Income (X)							Category of Amount of Income (X)										If yes, complete Schd. B Part I for those assets including those sold for a loss.	
		None (or less than $1001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$1,000,000	Over $1,000,000	Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	YES	NO
S or DC	Examples: X Y Z Common			X					X									X									X	
	Doe Jones & Smith, Hometown, USA		X												ptnrship income									$50,000			
4 S	Bagley Building Co. Detroit, Mi.--(Limited partnership which owns the Murphy Telegraph Building in Detroit)		X							X							X										
5	Investment Co. of America IRA Acct. (publicly traded)				X				X			Y						X	Y									
6	McNair Law Firm Hilton Head Island, S.C.				X										Salary										$68,490 (1986) $60,352 (1987)			
7	McNair Law Firm Profit Sharing Plan, Columbia S.C. (See Attachment A for current assets)				X											X												
8	C&S National Bank (savings) Hilton Head Is., S.C.	X										X						X							$2,650			
9	Adwell Corporation, Jacksonville, Ill., Family Corp. owning 14,000 acres of agricultural land in Ill., residential and commercial property in Clearwater, Fla.	X													Director's Fee													

PREVIOUS EDITION USABLE

278-209

OF 278 (Rev. 1/95)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0006

Reporting Individual's Name	Assets and Income	Page Number		Schedule A
ROSE, William S., Jr.			3	

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources		BLOCK B Valuation of Assets								BLOCK C Income														BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐		Category of Value (X)								Type of Income (X)							Category of Amount of Income (X)									If yes, complete Schd. B Part I for those assets including those sold for a loss.	
		None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000	Actual Amount Only If "Other" Specified	Date (Mo., Day, Yr.) Only If Honoraria	YES	NO
S or DC	Examples: X Y Z Common			X				X									X								X	
	Doe Jones & Smith, Hometown, USA			X										ptnrship income									$50,000			
10	GEICO Washington, D.C. (no longer owned)							X			Y				X				Y							
11 S	Rosewoods Partnership Hilton Head Island, S.C.			X											X											
	Partnership Interest in 1/12 of Botany Bay House, Inc., which owns two acres and a house on Botany Bay Island, Charleston County, S.C.																									
12 S	Workout, Inc. (Formerly taught exercise classes)	X												Salary												

PREVIOUS EDITION USABLE

278-208

832

SF 278 (Rev. 1/88)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting Individual's Name	Assets and Income	Page Number	4	Schedule A
ROSE, William S., Jr.				

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets								BLOCK C Income															BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)								Type of Income (X)							Category of Amount of Income (X)										If yes, complete Schd. B Part I for those assets including those sold for a loss.	
	None (or less than $1001)	$1,001-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000		Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$1,000,000	Over $1,000,000	Actual Amount Only If "Other" Specified	Date (Mo., Day, Yr.) Only If Honoraria	YES	NO
S or DC: Example — XYZ Common				X					X									X								X	
Example — Doe Jones & Smith, Hometown, USA			X												ptnrship income										$50,000			
13 Mt. Pleasant Golf Ltd. Ptnshp., Mt. Pleasant, S.C. 8% interest in ptnshp. which owns two miniature golf courses in Mt. Pleasant, S.C.			X															X									
14 R.A.T. Corp., Hilton Head Is., S.C. (Corp. owning a Cessna 414 aircraft)			X													X											
15 MBR Corp., Camden, S.C., Corp. owning 1900 acres near Camden, S.C.							X									X											
16 Traders of Camden, Inc., Camden, S.C. (liquor stores)		X							X								X										
17 NCNB Money Management Acct. (now closed) --Berkshire Hathaway	X															X											

PREVIOUS EDITION USABLE--Isuzu Motors

278-200

SF 278 (Rev. 1995)
Part Chapter 734
U.S. Office of Personal Management

Form Approved
OMB No. 3209-0001

Reporting Individual's Name		Page Number		Schedule
ROSE, William S., Jr.	**Assets and Income**		5	A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources			BLOCK B Valuation of Assets								BLOCK C Income																		BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐			Category of Value (X)								Type of Income (X)						Other (Specify Type)	Category of Amount of Income (X)									Actual Amount Only If "Other" Specified	Date (Mo., Day, Yr.) Only If Honoraria	If yes, complete Sched. B Part I for these assets including those sold for a loss.	
			None (or less than $1001)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust		None (or less than $101)	$101-$1,000	$1,001-$2,500	$2,501-$5,000	$5,001-$15,000	$15,001-$50,000	$50,001-$100,000	Over $100,000			YES	NO
	Examples	XYZ Common			X				X										X										
		Doe Jones & Smith, Hometown, USA		X											partnership income									$50,000			X	
10 S	NCNB Money Management Acct. Hilton Head Is., S.C.							X	X		Y												X Y					
	(For listing of individual assets of the account, See Attachment B)																											
19 DC	Promissory Note from M&R Corp. to Katherine Rose			X												X												
20 DC	Promissory Note from M&R Corp. to W.S. Rose III			X												X												
21 DC	Promissory Note from M&R Corp. to Whitaker B. Rose			X												X												
22 S	Alex Brown & Sons Acct Baltimore, Md.							X	X		Y									X		Y						
	(For individual assets see Attachment C)																											
23	Alex Brown & Sons Acct Baltimore, Md. (Closed --Alex Brown Cash Reserve Fund	X							X								X											

PREVIOUS EDITION USABLE

278-200

834

SF 278 (Rev. 1/95)
FPM Chapter 734
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0567

Reporting Individual's Name	Assets and Income	Page Number	6	Schedule A
ROSE, William S., Jr.				

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the actual amount of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets									BLOCK C Income																				BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)									Type of Income (X)								Other (Specify Type)	Category of Amount of Income (X)									Actual Amount Only If "Other" Specified	Date (Mo., Day, Yr.) Only If Honoraria	If yes, complete Schd. D Part I for those assets including those sold for a loss.	
	None (or less than $1001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	Over $250,000	Dividends	Rent	Interest	Capital Gains	Exempted Trust	Qualified Trust		None (or less than $101)	$101 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	Over $100,000			YES	NO
S or DC — Examples: XYZ Common			X				X									X											X	
Doe Jones & Smith, Hometown, USA		X											ptnrshp income									$50,000					
24 J Alex Brown & Sons Acct Baltimore, Md. (Closed	X						X								X													
--Alex Brown Cash Reserve Fund																												
--Armco, Inc.																												
25 S Ocala Golf, Ltd. Ptnshp.- Miniature Golf Course			X											X														
26 S Distribution of assets upon liquidation of Cumming						X	X			X										X	Y							
Allen Co., personal holding company, share	See Attachment D for list of liquidated assets from which Frances Rose received a pro-rata share- Assets deposited in NCNB Money Management Account of Frances Rose, Item 18																											
27 S 1/2 undivided interest in house and property on Jupiter Island, Fla. (Recently Inherited)					X									X														

PREVIOUS EDITION USABLE

278-200

835

SF 278 (Rev. 1/89)
FPM Chapter 735
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0005

Reporting Individual's Name

Page Number		Schedule B

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE ☐

S or DC	Example	Identification of Assets	Type of Transaction (X)				Amount of Transaction (X)					
			Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	$1,001-$15,000	$15,001-$50,000	$50,001-$100,000	$100,001-$250,000	Over $250,000
	Example	X Y Z Common	X			2/1/83		X			
1		Not Applicable									
2											
3											
4											
5											
6											

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only:
Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. Exclude transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), exclude gifts from relatives and exclude gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE ☐

S		Source (Name and Address)	Brief Description	Value
	Examples	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 8/16/83	$500
	Examples	Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
1		Not Applicable		
2				
3				
4				
5				
6				

PREVIOUS EDITION USABLE

278 108

SF 278 (Rev. 1-92)
Filed Chapter 73A
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0002

Reporting Individual's Name

Page Number		Schedule C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

		Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
S or DC	Examples	First District Bank, Washington, DC John Jones, 123 J St., Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware Promissory note	1981 1979	13% 10%	29 yrs. on demand	X		X		
1		C&S National Bank of South Carolina	Consumer Credit	1985	P+1%	Paid	X				
2		Hilton Head Is., S.C.									
3											
4											
5											
6											

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☐

	Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example	Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Home town, USA	7/78 Ownership agreed.
	Continued participation in profit-sharing plan of McNair Law Firm	McNair Law Firm & William S. Rose, Jr.	
	to the extent of leaving the vested account balance in the plan. No		
	further contributions will be made by the firm. The Plan is		
	administered by an independent manager (see Attachment A1. No		
	other agreements or arrangements exist.		

PREVIOUS EDITION USABLE

278-108

SF 278 (Rev. 1/88)
PPM Chapter 735
U.S. Office of Personnel Management

Form Approved
OMB No. 3209-0006

Reporting Individual's Name

Page Number		Schedule D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/83	6/83
	Doe Jones & Smith, Hometown, USA	Law firm	Partner	1/78	11/83
	Please See Attachment E				

Part II
Compensation in Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☐

	Source (Name and Address)	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, USA	Legal services
	Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction
	Please See Attachment F	

PREVIOUS EDITION USABLE

278-1/88

838

CONFIRMATION HEARING ON: EDWARD F. HARRINGTON AND KENNETH CONBOY

WEDNESDAY, DECEMBER 9, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:30 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr., chairman of the committee, presiding.

Also present: Senators Thurmond and Humphrey.

Staff present: Steven J. Metalitz, chief nominations counsel; Ronald Legrand, chief investigator; Andrew Rainer, investigative counsel; Andrew Tartaglino, investigator; Robert J. Short, minority chief investigator; Frank Klonoski, minority investigator.

Senator THURMOND. The committee will come to order. Senator Biden has been tied up and asked me to go ahead with the hearing; he will be here in a little bit.

I believe this is the second hearing for Mr. Harrington of Massachusetts. We have certain witnesses here; we will ask them to come around: Edward Hanify, Douglas Woodlock, Walter Prince, and Janice Berry.

If you will hold up your hands and be sworn, will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Judge WOODLOCK. It will.

Mr. HANIFY. It will.

Mr. PRINCE. It will.

Ms. BERRY. It will.

Senator THURMOND. Judge Woodlock, you can testify first if you want to and then we will take the others.

TESTIMONY OF A PANEL CONSISTING OF HON. DOUGLAS P. WOODLOCK, U.S. DISTRICT JUDGE, U.S. DISTRICT COURT, BOSTON, MA; EDWARD HANIFY, ATTORNEY, ROPES & GRAY, BOSTON, MA; JANIS M. BERRY, ATTORNEY, BOSTON, MA; AND WALTER PRINCE, ATTORNEY, BROWN & PRINCE, BOSTON, MA

Judge WOODLOCK. Mr. Chairman, in light of the time and the press of business, I will submit on my letter to Senator Kennedy; a copy has gone to you and Senator Biden. I will yield to you and the other witnesses, with respect, having asked that that letter be made a part of the record in lieu of an initial oral statement.

[Document follows:]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON, MASSACHUSETTS 02109

CHAMBERS OF
DOUGLAS P. WOODLOCK
JUDGE

November 30, 1987

EXPRESS MAIL

Senator Edward M. Kennedy
315 Russell Senate Office Building
Washington, D.C. 20510

Re: Edward F. Harrington
Nominee, United States District Judge
District of Massachusetts

Dear Senator Kennedy:

I am presuming upon your kindness, courtesy and consideration in connection with my appointment last year as the most recent member of the United States District Court for the District of Massachusetts to offer you my own recommendation regarding the next nominee to our bench, Edward F. Harrington.

In your remarks on my behalf at the Judiciary Committee Hearing last year you focused upon a "commitment to public service" which you considered critical to your recommendation. Confirmation Hearings on Federal Appointments: Hearings Before the Senate Committee on the Judiciary, 99th Cong. 2d Sess. 12-13 (1986) (statement of Sen. Kennedy). In doing so, you referenced my work in the public sector for two individuals whose Presidential appointment you were instrumental in securing: my senior colleague, Judge Frank J. Murray, for whom I was a law clerk; and, Mr. Harrington, by whom I was hired as an Assistant United States Attorney during his tenure as United States Attorney. The juxtaposition of my work with Judge Murray and Mr. Harrington was a telling one for me because Judge Murray and Mr. Harrington have provided models of the qualities to which I aspire in my own public service.

But your juxtaposition of my work for Judge Murray and Mr. Harrington also has a special pertinence for consideration of Mr. Harrington's pending nomination to our District court bench. As I said at my swearing-in ceremony, "I saw applied to the work of a trial judge [during my year-long clerkship with Judge Murray] the highest standards of probity, dignity and craftsmanship." Based upon my two and one-half years as an Assistant U. S. Attorney under Mr. Harrington and my knowledge of his career beyond my work directly for him, I have no doubt that Mr. Harrington will hold himself to and meet the same standards on the bench.

As you know, Mr. Harrington has given of himself selflessly and courageously to the pursuit at the cutting edge of the most important public issues a lawyer could confront in the cause of justice during the past 25 years. As a trial attorney in the Justice Department in the early 1960s, he literally worked in the trenches to secure civil rights for all Americans at a time when they were threatened by lawless interests. As an Assistant U. S. Attorney and then Chief of the Strike Force in Boston in the late '60s and early '70s, he successfully pursued prosecutions of organized crime throughout New England. As United States Attorney, he conducted a highly successful and professional office and left a special imprint on the prosecution of political corruption cases in Massachusetts--an area in which it was my privilege to serve him. While in private practice he held himself available to provide vigorous representation of indigent persons accused of crime. And he was prepared--as some less committed lawyers are not--to endure the slings and arrows of partisan electoral politics in order to seek the opportunity to offer further significant public service.

Throughout, he has conducted himself with vigor, great good humor, candor and fairness. As someone who worked closely with him, I found that he embodied precisely the personal characteristics a trial judge should have: an unswerving concern that justice be done and that it be done fairly; an unflinching commitment to important public concerns for the cause of justice; and an unwillingness to compromise those concerns to obtain the momentary good will of his adversaries at the bar or their clients.

His U. S. Attorney's office was an example of the setting which a skilled and committed administrator can foster for encouraging and reflecting the pursuit of the public interest. He moved quickly and successfully to increase the number of minority attorneys who worked as Assistant U. S. Attorneys. He drew a number of young women into the ranks of the office's trial attorneys and he assured throughout that the allocation of work was fairly apportioned among the skilled staff he assembled. He was supportive of his Assistants and took steps to insure that mistakes or missteps were not the occasion merely of embarrassment or recrimination but rather became opportunities to learn and grow. He was careful throughout to insure that his Assistants learned the disciplines of restraint and moderation which he himself practiced.

His own technical skills are of the highest order. He is to my mind the quickest, most practical, most sensible and sensitive trial lawyer I have encountered. He stands second to none in his mastery of the dynamics of the courtroom. And he was able to communicate those skills and that common sense to those who worked in close quarters with him.

In my case, my very first trial in the United States Attorney's office was conducted as co-counsel to Mr. Harrington. With sound but unobtrusive advice, he let me conduct most of the examination and much of the argument, teaching me in the process how most effectively to advocate the case on behalf of the United States. Yet when my enthusiasm for the righteousness of our cause manifested itself in what might be viewed as too forceful an adversarial attitude, he gently but effectively counselled and secured restraint and moderation in the presentation of the government's case.

Mr. Harrington has assumed his various roles in public office with grace, dignity and a sense of proportion. Based on my knowledge of his experience; my own exposure to his skills, personal character and temperament; and my own increasing sense of the difficulties, demands and rewards of being a trial judge; I can and do recommend him in the strongest possible terms as a nominee for United States District Judge for the District of Massachusetts.

It was an honor to have served with Mr. Harrington in the United States Attorney's office. I look forward to the honor--and the pleasure--of serving again with him in public office on the bench of the United States District Court for the District of Massachusetts.

I would be pleased to have this letter included in the record of Mr. Harrington's hearing before the Judiciary Committee and would welcome the opportunity to expand on these views in person or in writing if you considered that helpful to the Judiciary Committee's consideration.

Sincerely,

Douglas P. Woodlock

DPW/efb

cc: Senator Joseph R. Biden, Jr.
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Strom Thurmond
Room 218 Russell Senate Office Building
Washington, D.C. 20510

Senator THURMOND. All right. Now, let us see. You are Mr.——
Mr. HANIFY. I am Mr. Hanify.
Senator THURMOND. Mr. Hanify, all right, thank you. We are glad to have you here. You may go ahead now and make your statement.
Mr. HANIFY. Thank you, Mr. Chairman, and Senator Humphrey.
My name is Edward B. Hanify. I reside in Belmont, MA. I have practiced law in Boston since my admission to the bar in 1936, and I am now of counsel with the firm of Ropes & Gray, of which I have been a partner for 40 years.
Sitting with me at the table are Ms. Janis Berry and Walter Prince, who will later, within the ambit of your limitations, have some testimony.
My practice has been predominantly in the trial of cases and I have appeared before the incumbent judges of the State and Federal courts in Massachusetts for a half century. In other professional responsibilities, I have had occasion to consider judicial qualifications.
I now serve as a member of the Massachusetts Supreme Judicial Court's Advisory Committee on the form and method of proposed judicial evaluation for sitting Massachusetts judges. The Supreme Judicial Court of Massachusetts has also appointed me as counsel to institute and conduct certain critical proceedings involving the alleged misconduct of Massachusetts Superior Court judges, and in 1981 the judges for the U.S. District Court for the District of Massachusetts appointed me chairman of the Citizens Merit Panel to recommend appointees for the position of Federal magistrate.
I support the nomination of Edward F. Harrington as U.S. district judge. Although of different generations, he and I are natives of Fall River, MA, graduates of the same public high school and the same college, Holy Cross College, in Worcester.
With that background, I have followed Mr. Harrington's career during the years from his admission to the bar to the vigorous and efficient performance of his duties as U.S. attorney.
He was selected by the then chief justice of the superior court, the Hon. Paul C. Reardon, to be one of that court's first law clerks, and that selection was based upon his excellent academic record in college and law school.
The former chief justice of that court, Judge Reardon, who is now a retired justice of the Supreme Judicial Court of Massachusetts, has authorized me to say to this committee today in his absence because of another engagement that as a law clerk Mr. Harrington displayed great competence, devotion to duty, and won the respect of the judges.
Judge Reardon said also that I might say that as with so many appellate judges, he has followed with an interest akin to paternal or avuncular the future careers of his law clerks, and he has stated very positively that he has every reason to believe that the subsequent public and legal career of Mr. Harrington, one of his earliest law clerks, has been conducted "with great integrity."
Now, the qualifications of a competent judge are so well known to this committee that it is superfluous for anyone in my position to enumerate them. I can only claim to have observed for a half century those intangible qualities of a good judge which become

tangible in the performance of what trial lawyers call a good trial judge, and that is a man or woman who conscientiously strives to be a legal scholar and yet not a pedant, is patient and not dilatory, expeditious in ruling and decision but not hasty, and conscious of the dignity of the law and its impartial enforcement, as well as having some insight into human nature.

We think that John Adams put the absolute essentials in the Declaration of Rights in the Constitution of Massachusetts. "It is the right," he said, "of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."

And I have always thought, Mr. Chairman, that phrase, "as the lot of humanity will admit," was significant. The phrase is more comprehensive than the phrase "the lot of man." It seems to prophetically recognize the significant modern role of women in our jurisprudence.

Ms. Berry, an experienced woman trial lawyer and former Federal prosecutor, is here present and she will testify to the comprehensive, expanded role of women as trial lawyers and as prosecutors, which Mr. Harrington gave them in his tour of duty as U.S. attorney.

And that same phrase, "as the lot of humanity will admit," also recognizes that prospective judges are not required to be superhuman persons who, prior to judicial service, can escape, during the decades of the crucible of litigation and the hard decisions of law enforcement, the occasional friction or unhappiness of adversaries or disappointed parties.

I submit, Mr. Chairman and Senator Humphrey, that my views with respect to Mr. Harrington's qualifications for the Federal judiciary are shared by a substantial number of other Massachusetts lawyers who respect his reputation for probity, intellectual honesty, professional competence, impartiality, and independence.

I close by observing that the trial bar particularly appreciates the presence on the trial court of an attorney such as Mr. Harrington, who has had considerable litigation experience.

Thank you for your courtesy and attention. Now, may Ms. Janis Berry address the committee?

[Statement follows:]

STATEMENT OF EDWARD B. HANIFY, ESQ.
BEFORE THE SENATE JUDICIARY COMMITTEE
DECEMBER 9, 1987
IN SUPPORT OF THE NOMINATION OF
EDWARD F. HARRINGTON TO BE A
JUDGE OF THE UNITED STATES DISTRICT COURT

My name is Edward B. Hanify.

I reside in Belmont, Massachusetts.

I have practiced law in Boston since my admission to the bar in 1936, with the exception of service in the Navy during World War II. I am now "of counsel" with the firm of Ropes & Gray, of which I have been a partner for forty years.

My practice has been predominantly in the trial of cases. I have appeared before the incumbent Judges of the state and federal Courts for a half century.

In other professional responsibilities I have had occasion to consider judicial qualifications. I now serve as a member of the Massachusetts Supreme Judicial Court's Advisory Committee on the form and method of proposed judicial evaluation procedures for sitting Judges of the Commonwealth. The Supreme Judicial Court of Massachusetts has appointed me as counsel to institute and conduct critical proceedings involving alleged misconduct by certain Superior Court judges. In 1981 the Judges of the United States District Court for the District of Massachusetts appointed me chairman of the Citizens Merit Panel to recommend appointees for the position of Federal Magistrate.

I support the nomination of Edward F. Harrington as United States District Judge. Although of different generations, he

and I are natives of Fall River, graduates of the same high school and Holy Cross College.

With this background, I have followed Mr. Harrington's career during the years from his admission to the bar to the vigorous and efficient performance of his duties as United States Attorney. He was selected by the then Chief Justice and Justices of the Superior Court upon his graduation from law school as one of that Court's first law clerks. The selection was based upon his excellent scholastic record in college and law school. The former Chief Justice of that Court, now a retired Justice of the Supreme Judicial Court, the Honorable Paul C. Reardon, has authorized me to state today that as a law clerk, Mr. Harrington's competence and dedication to duty won the respect of that Court and its Justices. Justice Reardon further states that he has followed the careers of all his former law clerks, male and female, with the keen interest almost paternal or avuncular, with which many judges watch the realization of the promise of youth. Justice Reardon says that he has every reason to believe that the subsequent public and legal career of Mr. Harrington -- one of his earliest law clerks -- has been conducted "with great integrity."

The qualifications of a competent judge are so well known to this committee as to make their enumeration presumptuous. I can only claim to have observed for a half century those intangible qualities become tangible in the performance of

what the Trial Bar tersely calls "a good Trial Judge," and express my expectation that Mr. Harrington will become such a Judge. The "good Trial Judge" is the man or woman who conscientiously strives to be a legal scholar, yet not a pedant, is patient, yet not dilatory, expeditious in ruling and decision yet not hasty, conscious of the dignity of the Law with an insight into human nature. John Adams put the absolute essentials in the Declaration of Rights of the Constitution of Massachusetts:

> "It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."

I have always thought that reference to the lot of humanity" was significant. The phrase appears to be more inclusive than the "lot of man." It prophetically recognized the significant modern role of women in our jurisprudence. Ms. Janis Berry, an experienced woman trial lawyer and former Federal prosecutor, is here present and her comprehensive letter on file attests to Mr. Harrington's practical recognition of that important role of women attorneys in his administration as United States Attorney. The same phrase, "as the lot of humanity will admit," also recognizes that prospective judges are not required to be superhuman persons who, prior to judicial service, can escape during decades in the crucible of litigation or the hard decisions of law enforcement, the occasional friction or unhappiness of adversaries.

I believe that my views with respect to Mr. Harrington's qualifications for the Federal Judiciary are shared by a substantial number of other Massachusetts lawyers who respect his reputation for probity, intellectual honesty, professional competence, impartiality and independence.

I close by observing that the Trial Bar particularly appreciates the presence on the Trial Court of an attorney - such as Mr. Harrington, who has had considerable litigation experience.

Senator THURMOND. We are very pleased to hear from you, Ms. Berry.

Ms. BERRY. Thank you, Mr. Chairman.

I am Janis M. Berry. I currently practice law with the firm of Ropes & Gray in Boston, MA. I have practiced law in Boston for 13 years. For six of those years, I had the honor to serve the United States as a Federal prosecutor in the District of Massachusetts. I have also served as an Assistant U.S. Attorney, and as a Special Attorney with the New England Organized Crime Strike Force. My final appointment in government service was as the Chief of the Department of Justice New England Organized Crime Drug Task Force.

I have served under the administrations of Edward F. Harrington when he was the United States Attorney for Massachusetts; of William F. Weld, who is currently the Assistant Attorney General of the Criminal Division of the Department of Justice; and Jeremiah T. O'Sullivan, Chief of the New England Organized Crime Strike Force.

I have tried civil and criminal cases not only before Federal judges of the U.S. District Court for Massachusetts, but also, I have tried cases before the State judges in our various courts of the Commonwealth. Good fortune gave me the opportunity to serve as the law clerk to the Chief Justice of the Massachusetts Supreme Judicial Court.

Based on a rough accounting, Mr. Chairman, I believe that I may have more Federal criminal trial experience than any other woman in the District of Massachusetts, including what was the second longest criminal trial ever conducted in this district—a trial which extended over 7 months.

Since my departure from government service, I have been appointed by the Supreme Judicial Court to serve on the Committee for Public Counsel Services, which is the governing board for the statewide program to provide lawyers to indigent criminal defendants charged in the Commonwealth who cannot afford counsel. I have taken and will continue to take pro bono cases on the civil and criminal side, including cases in which I am qualified to represent defendants charged with first-degree murder. The First Circuit Court of Appeals has appointed me as appellate counsel to bring appeals before that court on behalf of indigent defendants. I have, therefore, tried cases and litigated appeals on both sides of the criminal bar and of the civil bar.

Based on the things that I know, I have come to learn that there can be no fairer judicial arbiter than a person who, as presiding judge, accepts the skills of those who appear before him or her for what they are and not because of distinction by sex, by class, by race, by political affiliation, by reputation, or by bar association contacts.

Mr. Harrington, I believe, will bring fairness to the bench, neutrality, and a blindness to bias and partiality. He has demonstrated the character that will be fundamental to sound judicial temperament. His professional career reflects that.

He has been a vigorous enforcer of the civil rights laws in the District of Massachusetts, and in one particularly sensitive civil rights prosecution brought by the U.S. Attorney's Office, Mr. Har-

rington served as my trial partner before the grand jury. I have worked with him, and I believe I know him.

There are other reasons, of course, why I support his nomination. Let me speak of his integrity. Mr. Harrington is a man of the greatest integrity—a man for whom I have utmost admiration. He has compassion, he has trial skills. He will be, I believe, what a trial judge should be.

However, most importantly, I would speak for women attorneys because there is a special element that Mr. Harrington has given us, and that is an element that finds expression in his endeavors to erase gender-based discrimination in the bar.

It was in his administration as U.S. Attorney for the District of Massachusetts that Mr. Harrington took decisive action to open the Federal courthouse to women trial lawyers and to end what had been an exclusive men's club of the criminal trial bar. He provided women the opportunity and the privilege to serve the United States and the government as prosecutors in criminal cases and trial attorneys in governmental litigation.

There is and there has been, by tradition, Mr. Chairman, discrimination against women as litigating attorneys in the courtroom. The trial bar has never been an hospitable forum for the woman as trial attorney. It is for such reasons that several years ago I, with other women, joined together to form the Massachusetts Women's Bar Association, for which I served on the board of directors for a time.

It is, at heart, Mr. Harrington's steadfast support and his encouragement which has dispelled the myth that women cannot be criminal defense attorneys and prosecutors. The precedents he set are the benchmark for our Federal district court practice now.

On a personal note, Mr. Chairman, I would relate an anecdote occurring while I worked for Mr. Harrington, I had one young daughter then. I have three daughters now. Mr. Harrington—even though he was constantly engaged in many endeavors as the lead Federal prosecutor for the District of Massachusetts—he always took the time to inquire of my family, and of people as people. He is a man of compassion and a man of passion.

It may be, Mr. Chairman, that women by past exclusion from playing team sports cannot come to know as easily as men the rites of passage whereby one is drawn into the heat of battle in the courtroom and then, at the end, one will move to shake hands and leave what has been the adversary of the courtroom behind.

I learned those things from Mr. Harrington—that you fight as hard as you should as an advocate for your client in the courtroom. Then, when your case is over, as a lawyer, as a member of the bar, you turn to your opposing counsel as someone with whom you shake hands, say congratulations, and the controversy ends.

Ted Harrington will bring compassion and spirit to the Federal court. He has always served and will continue to serve the people, men and women al[illegible] I urge this committee to accept his appointment as a Federal ju[illegible] so he can continue to serve the people—as he has for the United States and for the Commonwealth of Massachusetts.

Thank you.

[Statement follows:]

STATEMENT OF JANIS M. BERRY
BEFORE THE SENATE JUDICIARY
COMMITTEE, DECEMBER 9, 1987,
IN SUPPORT OF THE NOMINATION OF
EDWARD F. HARRINGTON TO BE A
JUDGE OF THE UNITED STATES DISTRICT COURT

My name is Janis M. Berry. I have practiced law in Boston for thirteen years since my admission to the Bar in 1974. For six of those years, I had the honor of serving the United States as a Federal prosecutor in the District of Massachusetts: From 1980 to 1981, I served as an Assistant United States Attorney in the administration of Edward F. Harrington; thereafter, from 1981-1984, I served as a Special Attorney with the New England Organized Crime Strike Force; and, from 1984 to 1986, I was appointed the Chief of the Department of Justice New England Organized Crime Drug Task Force.

I have tried civil and criminal cases not only before the Federal Judges of this District, but also before State Judges of the Superior, Probate and District Courts. Good fortune afforded me the honor of serving as a law clerk to the Chief Justice of the Massachusetts Supreme Judicial Court. As a result of these experiences, I have come to learn that there can be no fairer arbiter than a person who will accept the skills and worth of every person as they are -- for what they are -- and not because of distinction by sex, class, age, race, political affiliation, big firm - little firm, reputation, or bar contacts. Such essential

fairness, neutral and blind to bias and partisanship, is fundamental to judicial temperament. Ted Harrington's professional career reflects these neutral principles of justice.

There are other reasons, of course, why I urge the Committee to confirm Mr. Harrington -- his integrity, compassion, trial skills, and legal judgment are, in my view, beyond any real question. However, for women attorneys there is a special element that will mark Mr. Harrington's judgeship -- an element that finds particular expression in his endeavors to erase gender-based discrimination in court proceedings. The courtroom, by tradition, has not been a hospitable forum for women as trial attorney, litigant, victim or juror. Indeed, it is for that reason that the Massachusetts Supreme Judicial Court has recently commissioned a study of sex bias in the Courts of the Commonwealth. And, it was a response to the same patterns of discriminatory treatment that led in the early 1980s, to our organization of the Massachusetts Women's Bar Association, for which I have served on the Board of Directors.

Against this backdrop, as United States Attorney, Ted Harrington took decisive action to open the Federal Courthouse to women trial lawyers and to end the exclusive men's club of the criminal trial bar. He provided to women the opportunity and the privilege to represent the government

before the grand jury and at criminal trial in the full process of the law. Mr. Harrington's steadfast support and encouragement dispelled the myth that dangerous criminal cases could not be handled by women trial attorneys -- prosecution and defense. The precedents he set are the benchmark for practice in this District, where it is now accepted that women will try all manner and means of cases and can and will apply their skills at the bar to the full range of cases, not just on the civil side, but as advocate for the government and for the defense in criminal cases.

Ted Harrington will bring compassion and spirit to the Federal Court. He has always served and will continue to serve the people -- men and women alike. I would leave for the record this statement and my letter in support of Mr. Harrington's appointment as a United States Judge in our District.

ROPES & GRAY
225 FRANKLIN STREET
BOSTON, MASSACHUSETTS 02110
617 423-6100

TELEX NUMBER 940519 ROPGRALOR BSN
TELEX NUMBER 95-973 ROPES GRAY BSN
TELECOPIERS 617 423-2377 · 617 423-7843
INTERNATIONAL 617 423-6905

TELECOPIER 202 429-6

November 30, 1987

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Judiciary Committee
Dirksen Building, Room 224
Washington, D.C. 20510

Re: Edward F. Harrington

Dear Senator Biden:

In respect to the Senate Judiciary Committee's consideration of the appointment of Edward F. Harrington as a United States District Judge for the District of Massachusetts, I write not only strongly to endorse that appointment, but also to provide to the Committee what may be a fairly unique perspective -- that of a woman trial attorney and former Federal prosecutor.[1] Having tried many cases before the Federal judges in the District of Massachusetts -- including a seven month trial, which was the second longest criminal trial ever conducted in this District -- by rough accounting, I have more in-court federal trial experience than any other woman attorney in this District.

Based on everything I know about him and based on my experience before the Federal Court here, I am convinced that Mr. Harrington will be a fair, just and compassionate Justice, bringing to the bench the same strength of character, integrity and equal treatment of all that characterized his administration as United States Attorney.

While United States Attorney, Mr. Harrington set precedent by the number of his appointments as Assistant United States Attorneys of women and minorities, who, for the first time, came to have a major prosecutorial role in

---

[1] If the Judiciary Committee is to hold a further hearing on the appointment, I request the opportunity to appear.

Federal law enforcement in the District of Massachusetts. While I had never met him prior to our first interview, it was Mr. Harrington's reputation -- marked by fairness, excellence and honesty -- that drew me to his office. Thus, following a clerkship for the Chief Justice of the Massachusetts Supreme Judicial Court and past litigation practice with a major Boston law firm, my desire and willingness to serve as a government attorney -- as was the case with other women -- was achieved precisely because Mr. Harrington had instituted an appointment process based on merit and hard work.

The commitment to justice for all was a hallmark of Mr. Harrington's tenure as United States Attorney, and his vigilant enforcement of the Federal civil rights law never wavered. Even in the City of Boston, where it was sometimes perceived to be "impolitic" to authorize criminal prosecution of civil rights violations involving police brutality and race issues, Mr. Harrington -- who exercised the ultimate decision to prosecute or not -- decided each case irrespective of external pressures and notwithstanding the political or personal costs to him. Indeed, in one especially sensitive case, in order to deflect pressure on his staff attorneys, Mr. Harrington, in a courageous act, personally assumed the role of lead counsel. By his actions in these cases (as to which I have personal knowledge, being the prosecutor assigned), I came to greatly admire the integrity that Mr. Harrington brought to the office of United States Attorney, and will bring to his judgeship. His principled actions to ensure that justice be done demonstrate the character of the man.

Finally, I would note that I have also served as Chief of the Federal New England Organized Crime Drug Task Force under then Massachusetts United States Attorney William F. Weld, currently the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, and I served in the Boston Organized Crime Strike Force under Chief Jeremiah T. O'Sullivan. These later administrations built upon the standards for law enforcement, the cases developed and the work begun by Ted Harrington, whose administration had done more to further Federal criminal prosecutions than any to precede it. On a personal level, my service in the Weld and O'Sullivan administrations rested on the firm foundations first learned from Ted Harrington. The sheer force of his commitment to the fair and just administration of the Federal law taught me the meaning of public service. Mr. Harrington's integrity, impartiality and strength of character set the principles that I hope marked my later governmental service.

Based on all that I know of him, Mr. Harringcon will be a Federal judge of distinction. His courtroom will be one where all who appear will be assured of equal and fair justice.

Very truly yours,

Janis M. Berry

JMB:gb

FEDERAL EXPRESS

Mr. HANIFY. Now, may we hear from Mr. Prince, Mr. Chairman?

Senator THURMOND. We will be pleased to hear from Mr. Prince.

Mr. PRINCE. Thank you very much, Mr. Chairman. It is indeed a pleasure for me to be here this afternoon and give testimony on behalf of Edward F. Harrington for the position of U.S. district court judge.

As you know, my name is Walter Prince and I reside in Pembroke, MA, and I have practiced law since my admission to the bar in Massachusetts in 1974. I am currently the general counsel of the Massachusetts Bay Transportation Authority and I have also had the privilege of serving two governors in the State of Massachusetts on the Judicial Nominating Council.

In the spring of 1976, I had the honor of being appointed as assistant U.S. attorney for the District of Massachusetts. James N. Gabriel, a Nixon appointee, was the incumbent U.S. attorney.

After Ted Harrington was appointed U.S. attorney and prior to his assuming office, I made an effort to find out as much information about his background and personality as I could, since I had no personal knowledge of him.

His reputation in the trial community was of the highest order. I was told by numerous attorneys——

Senator THURMOND. Pull your microphone a little closer. We can hardly hear you.

Mr. PRINCE. Yes, I am sorry.

Senator THURMOND. And speak a little bit louder.

Mr. PRINCE. I was told by a number of attorneys that he was bright, talented, and well respected. All that I had heard about Ted Harrington was confirmed within a few short months after he assumed office. He immediately provided sound, clear leadership to the staff, and the office quickly began to reflect his style and philosophy.

While serving in the office, I had the opportunity to work with Ted on a criminal case. I was impressed by his willingness and commitment to work hard and his personal devotion to learning the facts of the case and devoting his time to supporting his staff in the courtroom while also handling the day-to-day administrative tasks of the office.

His dedication to excellence inspired myself and others to give our best effort in every case. After several months under his leadership, the depth of his knowledge and understanding of the law became readily apparent to us all. He has a clear understanding of the roles the prosecution, defense, and court play both in and out of the courtroom.

In my brief career, I have had the privilege and opportunity of working with an individual who, in my estimation, stands head and shoulders above most of his colleagues. The wisdom, judgment and compassion that Ted Harrington will bring to the court will enhance the confidence citizens have in our judicial process.

Therefore, I am most proud to support the nomination of Edward F. Harrington for appointment to the U. S. district court.

Thank you, Senator.

[Statement follows:]

96-183 0 - 89 - 28

STATEMENT OF WALTER B. PRINCE, ESQ.
BEFORE THE SENATE JUDICIARY COMMITTEE
DECEMBER 9, 1987

IN SUPPORT OF THE NOMINATION OF EDWARD F. HARRINGTON

My name is Walter B. Prince and I reside at [redacted] Water Street, Pembroke, MA. I have practiced law in Bos[redacted]e my admission to the Bar in Massachusetts in 1974, and cu[redacted]tly, I am the General Counsel of the Massachusetts Bay Transportation Authority.

In the Spring of 1976, I had the honor of being appointed an Assistant United States Attorney for the District of Massachusetts. James N. Gabriel, a Nixon appointee, was the incumbent United States Attorney.

After Ted Harrington was appointed United States Attorney, and prior to his assuming office, I made an effort to obtain information about his background and personality, since I had no personal knowledge of him.

His reputation in the trial community was of the highest order. I was told he was bright, talented and well respected. All that I had heard was confirmed within months after he assumed office. He immediately provided sound, clear leadership to the staff and the office quickly began to reflect his style and philosophy.

While serving in the office, I had the opportunity to work with Ted Harrington on a criminal case. I was impressed by his willingness and commitment to work hard and personally devote time to a criminal case while handling the administrative tasks of the office. His dedication to excellence inspired myself and others to give our best effort in every case.

After several months under his leadership, the depth of his knowledge and understanding of the law became readily apparent. He has a clear understanding of the roles the prosecution, defense and court play, both in and out of the courtroom.

In my brief career, I have had the privilege and opportunity of working with an individual who stands head and shoulders above most of his colleagues. The wisdom, judgment and compassion Ted Harrington will bring to the Court will enhance the confidence citizens have in our judicial process.

I am most proud to support the nomination of Edward F. Harrington for appointment to the United States District Court.

Senator THURMOND. Thank you.

Now, we have this letter, Judge Woodlock, signed by you. Without objection, we will place that in the record.

Judge WOODLOCK. Thank you, Senator.

Senator THURMOND. Do you want to make some comments on that?

Judge WOODLOCK. No, not as to the letter. And the only point that I would add to the statements that have been made by all of the proponents here today is a point made by one of our great Massachusetts trial judges, Justice Henry T. Lummus, also of our Supreme Judicial Court. In his famous Rosenthal lectures, he talked about the most important feature of a trial judge, one that I have in my year-and-a-half on the bench come to understand more clearly, the importance of impartiality.[1]

Ted Harrington has been an impartial but forceful advocate on behalf of all of the causes that he has represented. He represented the government, and he represented it forcefully and impartially.

He represented indigent criminal defendants—a matter that is close to my heart because I was chairman of the Massachusetts public defender authority—and he represented them forcefully and impartially.

Throughout, he has demonstrated what Justice Lummus referred to as the foundation of impartiality, and that is courage, the willingness to make decisions without respect of persons, as Proverbs puts it, and he is prepared to do that on every occasion.[2] That is a fundamental for a trial judge, and he will bring that to the bench.

As I indicated in my letter to Senator Kennedy, and I would like to reiterate again as briefly as I can, I support him wholeheartedly. I have worked with him. He has been a teacher of mine at the trial bar and I welcome the honor and the pleasure of serving with him again upon his appointment to our bench.

Senator THURMOND. The only complaint I believe we had against him concerned judicial temperament. Do you feel that he has sufficient judicial temperament to make a good judge?

Judge WOODLOCK. Absolutely. He brings not only the kind of compassion that Ms. Berry spoke of, but the humanity that Mr. Hanify spoke of, and he brings as well a backbone, a willingness to make the hard decisions.

Senator THURMOND. A Federal judge has a lot of power and there is no excuse for any judge using his power to embarrass lawyers, witnesses, or jurors or others connected with the court.

You feel that he does possess judicial temperament?

Judge WOODLOCK. I do, and I have had the opportunity to work with him in the grand jury and at trial as an assistant, and I have seen demonstrated his willingness to see that his assistants, like me, exercised caution, moderation and restraint in the way in which they presented their cases. He is a teacher in that regard.

Senator THURMOND. Mr. Hanify, what do you say about his judicial temperament?

Mr. HANIFY. I think he would have a fine judicial temperament, Your Honor. I have had no indication from the generality of the

---

[1] H.T. Lummus, The Trial Judge (1937), 8–15.

[2] Id. at 18–19.

bar with whom I have discussed his nomination, no indication of a temperament that would be explosive or unfortunate. He seems to have a reputation for poise, calmness, and a deliberateness, as well as fairness.

Senator THURMOND. Ms. Berry, how do you feel about judicial temperament?

Ms. BERRY. Mr. Chairman, I believe that Mr. Harrington, whom I have seen with many, many people, both litigants, both other lawyers and witnesses and victims, is one of the most compassionate men of the people that I know, and I believe as a judge that all who come in his courtroom will feel the quality of his fairness and his temperament as one in which it would be an honor to be in his courtroom.

Senator THURMOND. Mr. Prince, how do you feel about the judicial temperament?

Mr. PRINCE. Mr. Chairman, I do not think I can add much more than what has already been stated. I fully agree with everything that has been said and, clearly, Mr. Harrington will provide—or has the appropriate judicial temperament to be a U.S. district court judge.

Senator THURMOND. Senator Biden has not come in yet. When he comes in, he may want to ask you a question, but that is all the questions I have and I want to thank you very much for coming here and testifying.

Mr. HANIFY. We thank you, Senator.

Ms. BERRY. Thank you, Mr. Chairman.

Senator THURMOND. And if you will just remain until he does come and see if he has any questions.

Ms. Alice Richmond, is she here, Alice Richmond?

Ms. RICHMOND. Yes.

Senator THURMOND. Mr. Richard Donahue?

Mr. DONAHUE. Yes, sir.

Senator THURMOND. And Mr. Earle Cooley.

Ms. RICHMOND. Mr. Cooley is not present at the moment.

Senator THURMOND. I see, all right. Have you all been sworn yet?

Ms. RICHMOND. No, Senator.

Mr. DONAHUE. No, we have not.

Senator THURMOND. Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DONAHUE. It will.

Ms. RICHMOND. It will. Thank you.

Senator THURMOND. We will be glad to hear from you now. Ms. Richmond, you can go ahead.

TESTIMONY OF A PANEL CONSISTING OF ALICE E. RICHMOND, ATTORNEY, HEMENWAY & BARNES, BOSTON, MA; AND RICHARD DONAHUE, ATTORNEY, DONAHUE & DONAHUE, BOSTON, MA

Ms. RICHMOND. Thank you very much, Senator Thurmond, Senator Humphrey. It is an honor to be here. One of the issues that brings me here today is the question of Mr. Harrington's temperament. I have submitted a written statement to the committee

which I would request be made part of the record. I do not intend to repeat word for word what is in that statement partially because it is long and partially because I think this is material the committee can read at its leisure.

Before I focus on the issue of Mr. Harrington's temperament, I think one may well ask: where does temperament fit on the spectrum of qualities that we want in our judges?

It has been suggested by some people that temperament is a quality which is less important for a judge than academic credentials or intellectual ability. I disagree. From where I sit—as a trial lawyer, as a former president of a State bar association, as a former prosecutor and criminal defense lawyer, and now primarily as a civil practitioner—in my view nothing is more important than temperament in a trial judge.

Americans put great faith in the fairness and dignity of our judicial system. In a courtroom, the trial judge sets the tone. Our citizens have a right to expect that the tone in a courtroom will be one, at minimum, of civility, and, hopefully, should be one of reasonableness, rationality and fairness.

My concern with Mr. Harrington, the reason I am here today, is a concern with his temperament. It is a concern that when one disagrees with Mr. Harrington, that disagreement is inevitably personalized; that this personalization reaches a level of intensity which frequently is out of all proportion to the incidents involved.

I speak for myself. I am not here on behalf of anyone else, but I speak, as I said, as a former president of the Massachusetts State Bar Association, a statewide organization of more than 19,000 lawyers, which is one of the largest voluntary bar associations in this country.

Throughout the past year, during the period of my incumbency as bar president, many, many, many lawyers have told me about specific incidents involving the excesses of Mr. Harrington's conduct in the litigation area. As stories of his possible nomination to the Federal court were reported in the media, I began to hear more of these reports.

It has been suggested by some that these reported excesses are part of the adversary process. I submit to you, Mr. Thurmond, and to the committee, that trial lawyers can make a distinction, and do make a distinction, between those things which happen in the heat of battle and those things which are clearly outside the norm of the adversary process.

During the past week to 10 days, the papers in Boston, MA, have reported that the committee would be holding a second hearing regarding Mr. Harrington's nomination. My name, as well as Mr. Donahue's and Mr. Cooley's, have been printed in the papers as being possible witnesses.

Although I have declined to speak with the reporters regarding the substance of my testimony, it is fair to say that the fact of it has become well known, so well known that in the last week people have stopped me on the street, have called me on the telephone, have come up to me at Christmas parties all to recount incidents involving Mr. Harrington's temper.

That is not to say that in all instances Mr. Harrington was necessarily wrong and the person describing the incident involving

Mr. Harrington's temper was necessarily right. But it is fair to say that all of the reported incidents describe a personality that seems prone to the kind of explosive outbursts that other people remember, particularly because they seem so inappropriate to the circumstances involved.

In my case, I first came to know Mr. Harrington well in 1976 when I was the prosecutor of a very highly publicized first-degree murder case. Mr. Harrington entered the case as one of two lawyers on behalf of the defendant.

At that time, I knew Mr. Harrington only by reputation. In fact, I had voted for him in a primary election in 1974, so I was quite anxious to see him in action. From almost the beginning of that case, he was abusive, if not intimidating. He suggested at all times that if I were not lying, my conduct was improper, if not unethical.

We were unable to reach agreement on almost any subject, and he personalized our disagreements to such an extent that I, in my mind, a less experienced trial lawyer than he was, began to believe that he might well be right.

Shortly before the trial was to begin, a potential plea bargain that would have permitted Mr. Harrington's client to plead guilty to 2nd degree murder fell apart. In the materials which I have submitted to the committee is a partial transcript of a court hearing regarding the alleged broken plea agreement. I was called as a witness and Mr. Harrington cross-examined me. In that transcript, the trial judge instructed Mr. Harrington that he was to stop using a particular tone of voice in questioning me; my memory is that Mr. Harrington was literally screaming at me.

In any event, the murder trial ultimately went forward. At one point during the course of that trial, Mr. Harrington and I had a very serious disagreement at side bar while the jury was present.

It is my memory that the judge in that case excused the jury and asked us to come into chambers to see if we could resolve the problem. We were filing single file into chambers. The judge, who was in front, asked a question and started to turn toward us. As he was turning, Mr. Harrington leaned towards me—he was right in back of me—and within inches of my ear said "you lying * * *." and the next thing he said I would prefer not to testify to. I would be willing, if the committee wished, to pass up to the committee what it was that Mr. Harrington said to me as I walked into the judge's chambers.

The CHAIRMAN. I do not think that is necessary. I think we know—I think we have filled in the blanks.

Ms. RICHMOND. Thank you, Senator Biden.

In any event, to say I was stunned would be an understatement. I reported the incident to Frank Bellotti, the Attorney General, for whom I was then working as a Special Assistant Attorney General. After talking with him, I chose not to pursue the matter further, although I thought the conduct was worse than improper.

It has come to my attention over the years that mine was not an isolated incident; that when Mr. Harrington loses his temper, it is frequently accompanied by some sort of obscenity, and that it is explosive.

And as recently as 1983 in another case in which Mr. Harrington was defending a man accused of rape, a woman prosecutor was sub-

jected to the same conduct in that he called her a liar just as they approached the judge's bench for a sidebar conference.

I think if you were to speak—and I have the highest regard for Mr. Hanify—to people who are practicing now in the courts of the Commonwealth, to lawyers across Massachusetts, that they would describe a relatively large number of incidents that, each taken by itself, might not disqualify a person from appointment to the Federal bench.

But taken as an aggregate and composite picture of Mr. Harrington's behavior over an extended period of time, it describes a personality which, in the view of many, many people, is unpredictable, volatile, and frequently abusive. There is a fear that the quality of justice in his courtroom will be, at best, uneven and, at worst, vindictive.

Nor is it accurate that the opposition to Mr. Harrington is based upon his having been a "tough" prosecutor. As I understand and have heard it, the opposition to Mr. Harrington's nomination is based on the collective belief that if Mr. Harrington becomes a judge, the pattern of intemperate and abusive conduct he has displayed over the years will continue in the courtroom. Such conduct would not only be detrimental to individual litigants and counsel but would be a great disservice to the fine tradition of the Massachusetts Federal courts and to the faith that we all have in the fairness and dignity of our judicial system.

[Statement follows:]

TESTIMONY OF ALICE E. RICHMOND
REGARDING THE NOMINATION OF EDWARD F. HARRINGTON TO THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
DECEMBER 9, 1987

Good afternoon. My name is Alice Richmond and I am a member of the bar of the Commonwealth of Massachusetts. I appear before you this afternoon to express my opposition to the nomination of Edward F. Harrington to the United States District Court for the District of Massachusetts. My opposition is based not only on my personal experiences with Mr. Harrington but upon the literally scores of conversations that I have had with other Massachusetts lawyers. To oppose a nomination submitted by the President of the United States is not an act that I, or any other responsible lawyer, do lightly. I believe that Mr. Harrington lacks judicial temperment to such a degree that I chose to accept the Committee's invitation to discuss my concerns publicly.

I speak only for myself but my views are shared by the many Massachusetts lawyers who have sought me out during the past year to express their concerns and objections to this nomination. All have recounted personal experiences with, or observations of, Mr. Harrington. Although most of the reported incidents deal with Mr. Harrington's behavior as a lawyer, at least two that I can recall involve non-adversarial or seemingly "social" situations. And, in every instance, the description of Mr. Harrington's behavior was remarkably similar: he exhibited an intensity of reaction that was, at best, inappropriate or out of proportion to the situation and, when challenged or disputed, he personalized the disagreement so as to prohibit or preclude

rational discussion or resolution. These reports describe more that a quick temper; they describe such intensity and personalization that, even in the rough and tumble of the adversary system, Mr. Harrington's outbursts are regarded as outside the accepted norm.

These accounts of Mr. Harrington's explosive, if not abusive, conduct come from Massachusetts lawyers of widely different ages, backgrounds, experiences and perspectives. They come from both men and women and extend in time from my own experiences of more than a decade ago to the relatively recent past.

It has been suggested that the opposition to Mr. Harrington's nomination is based primarily on the fact that he switched political party registration from Democrat to Republican. Such a suggestion is, in my view, nonsense. I am a registered Democrat and proud to be one; I voted for Mr. Harrington in the 1974 Democratic primary election for Massachusetts Attorney General. Not once during any conversation I have had about Mr. Harrington's temperment and conduct have I ever heard anyone mention Mr. Harrington's past or present political affiliation, much less cite it as a reason for opposing his nomination.

Nor, in my experience, are trial lawyers unable to distinguish between behavior generated by the "heat of battle" and inappropriate over-reaction and personalization. And, at this point, it might be helpful for the Committee to learn what my "experience" consists of as it evaluates my testimony.

I graduated from Cornell University in 1968; while a Cornell student, I served as an intern to both Senator Robert F. Kennedy and Senator Jacob Javits. I began Harvard Law School in 1968 and was awarded a Sloan Urban Fellowship in the Spring of 1969. I spent approximately one year in the Office of the Mayor of the City of New York and returned to Harvard in the fall of 1970; I received my law degree in 1972.

I spent the year immediately following my graduation from Harvard as a Law Clerk to the Justices of the Superior Court of Massachusetts. From mid-1973 through mid-1976, I was an Assistant District Attorney in Suffolk County (Boston), Massachusetts; I was an Assistant Professor of Law at the New England School of Law from 1976 through 1978 where I taught Criminal Law and Procedure, Constitutional Law and Evidence. I have taught at several other colleges and universities in Massachusetts and have contributed to several books and published articles; I am a board member of several non-profit corporations. I serve on the five member Massachusetts Board of Bar Examiners, having been appointed by the Massachusetts Supreme Judicial Court.

I have been a member of the American Bar Association's House of Delegates since 1980; I am presently the Vice Chairman of the Committee on Rules and Calendar of the House of Delegates. I serve on the Board of Governors of the Massachusetts Academy of Trial Attorneys. I am the Immediate Past President of the Massachusetts Bar Association, a statewide organization of approximately 19,000 lawyers and one of the largest voluntary bar

associations in the country.

I have been in private practice since 1978 and presently am a partner at Hemenway & Barnes, one of Boston's oldest law firms. I live in Boston with my husband and my daughter.

My experiences with Mr. Harrington date back to late 1975 or early 1976, although I may have been introduced to him before that time. I was an Assistant District Attorney in Boston and had been appointed a Special Assistant Attorney General to prosecute James F. Blaikie for the murder of David DeWilde. Mr. Blaikie's defense lawyer was Daniel Harrington; at some point, I believe shortly after Mr. Blaikie was indicted for first degree murder, I was informed that Edward F. (Ted) Harrington would be entering the case as co-counsel for Mr. Blaikie.

I knew that Ted Harrington had been involved with a federal organized crime strike force and was anxious to see him in action. Yet, almost from his initial appearance, Ted Harrington's behavior was intimidating, if not abusive. He frequently yelled. Almost every disagreement about discovery, scheduling or the like resulted in a personalization of the dispute with Ted Harrington suggesting that my conduct was improper, if not unethical. He regularly stated that the police officers were lying and implied that I was as well. It was almost impossible to reach agreement about any aspect of the case or trial; Ted Harrington's position, sometimes articulated in open court, was that I was either unreasonable or misstating the facts.

Shortly before the murder trial was to begin, a dispute

arose concerning the substance of a plea bargain allegedly offered to Mr. Blaikie by me and an Assistant District Attorney from another county. On Mr. Blaikie's behalf, Mr. Harrington filed a Writ of Mandamus, attempting to force the District Attorneys for whom I worked to "perform" a plea agreement which I and the other Assistant District Attorney involved denied having finalized. Ted Harrington made it quite clear to me that he thought I was lying.

An evidentiary hearing was ordered by the Superior Court (Morse, [now]C.J.) and I was cross-examined by Ted Harrington. It is my memory that, almost from the beginning of his examination, Mr. Harrington was shouting at me. I was not only his adversary with a different perspective about the relevant events; I was a liar, if not worse. His whole tone and manner was so accusatory that, at one point in his cross-examination of me, the following exchange occured (p. 133):

[Ted] Harrington: I'm asking you - yes or no - was that the date that Mr. [Dan] Harrington had to make a decision by five o'clock on Monday?

Mr. Connelly: Objection, Your Honor, to that type of question.

[Ted] Harrington: I'm asking her to answer the question.

The Court: Just a moment, Mr. Harrington. All persons who have testified in this case are lawyers. Although there is a disagreement among the lawyers, it doesn't mean

that the rules of courtesy have to be abandoned.

[Ted] Harrington: I apologize, Your Honor. I would ask that the witness be instructed to answer the question. She's under cross-exmination.

The Court: Yes, but I don't see that there's any inconsistency at this moment.

Now, ask your question, if you wish, and point towards a particular conversation but don't use that tone of voice.

[Ted] Harrington: I apologize, Your Honor.

The Court (Morse, CJ.) ultimately refused to issue the Writ of Mandamus, finding that there had never been a "meeting of the minds" regarding the plea agreement. Several months later, the Court refused to grant a new trial on the mandamus issue when Blaikie contended that "the newly discovered evidence will attack the credibility of the prosecutor Richmond, whose testimony was important to the judge's findings at the hearing on the mandamus complaint." The trial court's decision was affirmed by the Supreme Judicial Court. 375 Mass. 613.

The murder case mistried in August, 1976 and was retried in November, 1976. Throughout the intervening months, the Mssrs. Harrington's trial strategy clearly revolved around the proposition that the police officers were fabricating inculpatory evidence against Blaikie and that I was aware of it, if not assisting in such fabrication. At some point during the trial, a

dispute arose while the jury was in the courtroom. My memory is that we were at sidebar and that Mr. Harrington was vehemently disagreeing with something I said. The Judge (Maguire, J.) excused the jury and told counsel to accompany him to his lobby to discuss the matter. As we were filing into the Lobby, the Judge, whose back was to us, asked me a question. I started to answer and Harrington, who was immediately behind me, leaned forward and said loud enough for me to hear: "you lying c---."

I am neither naive nor particularly sheltered. Nevertheless, I was so taken aback by Mr. Harrington's remark that I was practically unable to respond coherently to the Judge's inquiry. I was frightened by the intensity of Mr. Harrington's reaction and confused about what I viewed as a totally inappropriate response to a professional disagreement.

Although I did report Mr. Harrington's remark to Attorney General Bellotti, I chose not to pursue the matter. It was only much later that I came to realize that such outburts, at least sometimes accompanied by obscenities, were characteristic of Mr. Harrington's personalization of disputes. In 1983, in a similar situation involving a female prosecutor trying a serious rape case, Mr. Harrington, who had been insisting that the prosecutor "knew" that she was "railroading an innocent man", called the prosecutor a "liar" or a "f------ liar" as they approached the sidebar for a bench conference; Mr. Harrington's client was subsequently convicted of rape.

Neither time nor space permit me to recount all of the incidents I have heard regarding Mr. Harrington's lack of

control, his disproportionate reaction to, or personalization of, the kind of disputes or disagreements that regularly arise during the course of litigation. It is my understanding that the Committee may have some additional information as a result of its investigation.

To our judges, both federal and state, is entrusted the commonly held American belief that justice is achieved by a process that is both fair and rational. Yet, by its very nature, the process is adversarial and advocates frequently disagree not only with each other but with the trial judge. My concern, and that of others with whom I have spoken, is that Mr. Harrington will not be able to accept disagreement and will respond, as he has in the past, by personalizing the dispute. In a trial court, so much is left to the judge's discretion and the standard for review of discretionary acts is, as it should be, among the strictist in Anglo-American jurisprudence. Were Mr. Harrington to be confirmed as a judge, the consequences of his tendency to personalize disputes and to regard those who disagree with him as his enemies, if not worse, would be disasterous not only for the lawyers who appear before him but especially for their clients.

I urge you to decline to confirm Mr. Harrington as a judge of the United States District Court for the District of Masschusetts.

RESUME

ALICE ELENOR RICHMOND
Business Address:
Hemenway & Barnes
60 State Street
Boston, Massachusetts 02109
(617)227-7940

EDUCATION

Harvard Law School - J. D., 1972 (Leave of Absence 1969-1970 to accept Alfred P. Sloan Urban Fellowship)

Cornell University - B. A., 1968 Magna Cum Laude, Highest Distinction

Malverne High School - 1964 (Malverne, New York)

FELLOWSHIPS, SCHOLARSHIPS AND HONORARIES:

Alfred P. Sloan Urban Fellowship (1969-1970)
Woodrow Wilson Fellowship (declined)
Cornell University Public Affairs Fellowship (1967)
New York State Regents Scholarship and Scholar Incentive Awards (1964-1968)
Mortar Board (National Women's Collegiate Honorary)
Outstanding Young Women of America
1982 Ten Outstanding Young Leaders Award (Boston "Jaycees")
Who's Who In American Law
North Adams State College Honorary Doctor of Laws Degree

BAR ADMISSIONS:

Commonwealth of Massachusetts, 1973
United States District Court (Massachusetts), 1975
First Circuit Court of Appeals
U.S. Supreme Court

Member, BOARD OF BAR EXAMINERS, Commonwealth of Massachusetts

PROFESSIONAL EXPERIENCE:

A. Trial Advocacy/Litigation:

Partner - Hemenway & Barnes, 60 State Street, Boston, Massachusetts 02109 (present)

Associate - Lappin, Rosen, One Boston Place, Boston, Massachusetts 02109 (September, 1978 - July, 1981)

Special Assistant Attorney General - Commonwealth of Massachusetts (January, 1976 - November, 1977)

Assistant District Attorney - Suffolk District (Boston) (September, 1973 - September, 1976)

Law Clerk to Justices - Massachusetts Superior Court (September, 1972 - September, 1973)

Legal Assistant - Roxbury Defenders' Committee (Roxbury, Massachusetts) (Fall/Winter, 1971 - 1972)

Legal Assistant - Mountain Justice Institute (formerly the Appalachian Volunteers) Prestonsburg, Kentucky (Summer, 1969)

B. (1) Teaching Experience:

Assistant Professor of Law - New England School of Law - Constitutional Law, Criminal Law, Evidence, Clinical Evidence (September, 1976 - July, 1978)

Adjunct Professor of Law - New England School of Law - Clinical Evidence (1978 - 1979)

Lecturer on Law - Northeastern University (University College) (1974 - 1978)

Consultant and Lecturer - Massachusetts Criminal Justice Training Council (1975 - 1981)

Lecturer - Massachusetts State Police Academy (1977 - 1981)

(2) Specialized Teaching in Trial Advocacy:

Assistant Team Leader - Massachusetts Continuing Legal Education Trial Advocacy Course (Summer, 1978 - Summer, 1982)
Faculty Member (1983 - present)

Practitioner/Faculty - Harvard Law School - Intensive Trial Advocacy Workshop - (1975 - present)

Faculty - National College of Criminal Defense (Houston, Texas) (1980)

C. Other Employment:

Legal Research Assistant - Harvard Law School (Professor Gary Bellow) (Summer, 1972)

Summer Associate - Hill and Barlow, 225 Franklin Street, Boston, Massachusetts (Summer, 1971)

Program Budget Analyst - Office of the Mayor of the City of New York, Bureau of the Budget (September, 1969 - September, 1970)

Intern - Senator Jacob Javits (Washington Office) - assigned as intern to the Senate Labor and Public Welfare Committee Minority (Republican) Counsel (Summer, 1967)

Intern - Senator Robert F. Kennedy (Washington Office) (Winter, 1967)

D. Professional Memberships and Activities:

American Bar Association:
Delegate, ABA House of Delegates (1980 - present)
Vice Chairman Committee on Rules & Calendar (1986 -)
Vice Chairman, ABA Task Force on Crime (1983)
Vice Chairman, ABA Committee on Prosecution Function (1981 - 1982)

Massachusetts Bar Association:
President (1986 - 1987)
President-Elect (1985 - 1986)
Treasurer (1984 - 1985)
Vice President (1982 - 1984)
Executive Committee (1978 - present)
Delegate, Board of Delegates (1978 - 1982)
Member, Committee on the Recall of Judges
Member, Committee on Professional Ethics
Chairman, Criminal Justice Section Council (1978 - 1980)

Massachusetts Association of Trial Attorneys
Member, Board of Governors (1981 - present)

Visiting Nurse Association of Boston
Member, Board of Directors and Executive Committee (1982 - present)

Member, Supreme Judicial Court Advisory Committee on the Rules of Criminal Procedure (1979 - present)

Hearing Committee Member, Board of Bar Overseers (1980 - 1985)

Panelist, American Arbitration Association

National Consumer Law Project
Member, Board of Directors
(1983 - 1985)

Volunteer Lawyers' Project
Member, Board of Directors
(1983 - 1985)

Senator THURMOND. Ms. Richmond——

Ms. RICHMOND. Yes, sir.

Senator THURMOND. I have a November 23, 1987, letter from Daniel G. Harrington, who I understand is no kin to this Mr. Harrington, regarding events which took place during the Blaikie murder trial.

Mr. Harrington alleges you were the prosecutor in that case and that your failure to provide the defense with copies of all of the statements that the defendant made to the police, as required by a pre-trial agreement, violated the defendant's constitutional rights and thus caused the trial judge to declare a mistrial in the 1976 case.

How do you respond to this allegation?

Ms. RICHMOND. Your Honor—I am sorry, Mr. Thurmond——

Senator THURMOND. As briefly as you can now because we have got some other hearings. Just go ahead.

Ms. RICHMOND. Yes, sir. That allegation was raised continually. In the first instance, neither the trial court nor the Massachusetts Supreme Judicial Court found that I had failed to give statements, as required by a pre-trial agreement.

The trial court found particularly that neither side was to blame for it; in fact, the trial court specifically ruled that the failure of the statements to be handed over was a result of the defense lawyers' failure to bring a proper motion to the court's attention.

In addition, that issue with respect to the statements was raised on appeal to the Supreme Judicial Court of Massachusetts, which found that there was no merit to it, Mr. Thurmond.

Senator THURMOND. Mr. Harrington also stated that in the second Blaikie case he attempted to call you as a witness to raise a suggestion of possible fabrication of additional statements after you represented to the court in the first Blaikie trial that there were no other statements and then introduced two additional statements at the retrial.

Now, that is not this Harrington, you understand, but the other one.

Ms. RICHMOND. Yes, sir, I do.

Senator THURMOND. Now, would you comment on this matter?

Ms. RICHMOND. Yes, sir. In that instance, again, the Supreme Judicial Court found that it was inappropriate to subpoena me or to attempt to call me as a witness on behalf of the defendant.

What I had agreed to give Mr. Harrington, both Mr. Harringtons, were the statements that the prosecution intended to use at trial. During the first Blaikie trial, the detective involved had testified to some statements of the defendant which had not been reduced to writing and which had not been handed over to the defense.

He did so, as he testified under oath, inadvertently and in direct contravention to my specific instructions that he limit himself and his testimony to that which had been given to the defense.

Prior to the second murder trial, we turned over every conceivable syllable that Mr. Blaikie had said to these two police officers on three separate occasions. At no time, Mr. Thurmond, was I present when the defendant made these statements to the police officers. At a minimum, the Supreme Judicial Court found that I would not

have any way of corroborating or attacking the credibility of the police officers, since I had no firsthand information as to what Mr. Blaikie had said.

Senator THURMOND. Mr. Daniel G. Harrington also alleges that you told him that the motion to make you a witness was a personal affront to you, as your integrity was being questioned, and that you "would not forget this."

Ms. Richmond, did you make this statement?

Ms. RICHMOND. Well, I do not know if I said those exact words. I certainly thought it at the time, and I am afraid I still think it. I do not know about the "I will not forget it" part, but throughout the trial, the trial strategy of both Mr. Harringtons appeared to be that if they could cause the prosecution to make a mistake that they would manage to get their client acquitted.

And it is precisely, Mr. Thurmond, the personalization of that process that I objected to then and that I object to now, and I think that mine was not a unique case.

Senator THURMOND. He also stated in his letter to Senator Leahy in these words, "It is my considered opinion"—this is his wind-up of the letter to Senator Leahy—"that the enunciated ill will that the Blaikie trial engendered in Attorney Richmond has colored her perception of Mr. Harrington's qualifications for appointment to the Federal bench."

Would you care to respond to that?

Ms. RICHMOND. Yes, sir, I would. We are talking about events that occurred 11 years ago. A lot of things have happened in those 11 years. I think it important to note that, not only have I never testified before this committee in opposition to any judicial nomination before, but I have never testified anywhere, despite my position as a visible member of the Massachusetts trial bar, in opposition to any judicial nomination.

Mr. Harrington's name was considered by the Massachusetts Judicial Nominating Committee for appointment to the State trial court and declined to recommend him. I did not express an opinion at that time, which was back in 1982 or 1983, I believe, so that I have not been saving this up, Senator Thurmond, for 11 years waiting for an opportunity to testify against Mr. Harrington.

In fact, I probably would not have come today except for the fact that I genuinely believe that the opposition to Mr. Harrington throughout Massachusetts, as expressed to me while I was the President of the Massachusetts Bar Association, is substantial enough to raise serious concerns about his confimation.

Senator THURMOND. Now, Senator Biden may have some questions and then we will ask Mr. Donahue some questions.

Senator Biden.

[Letter and article follow:]

Daniel G. Harrington
Attorney at Law

18 Tremont Street, Boston 02108
Suite 530
(617) 227-1795

November 23, 1987

Senator Patrick J. Leahy
Senate Judiciary Committee
Room 224
Dirkson Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

I am writing this letter because I recently read in the Boston Herald newspaper that Attorney Alice Richmond was opposing the confirmation of Attorney Edward F. Harrington to the United States District Court bench. Because of my close involvement with both parties during a highly controversial murder trial, I believe that I can shed some light on their professional relationship.

My client, James F. Blaikie was charged with the murder of one Ceasar D. DeWilde on January 14, 1975. Alice Richmond was in charge of the prosecution of this case and I was appointed by the Court as the attorney for the indigent Blaikie.

The case immediately generated an avalanche of publicity for the following reasons: (see attached article regarding gag order.)

Blaikie was the well known and politically connected Treasurer of the McGovern presidential campaign in Massachusetts;

DeWildes' body was found buried in the cellar of Blaikies' home located on exclusive Fisher Hill in Brookline, Massachusetts ten months after his disappearance;

Blaikie was also being sued by "Smoki" Bacon, the widow of socially prominent Edwin Bacon, who claimed Blaikie murdered her husband to collect on a forged insurance policy;

The Waltham Police had requested that Blaikie submit to a lie detector test to help clear up questions regarding the apparent suicide of his mother under suspicious circumstances.

For the Press, this was a murder made in Heaven.

Shortly before trial, I asked Edward F. Harrington to assist me in this indigent case as I was a sole practitioner and was unable to cope with its many facets. He agreed, even though it meant a financial sacrifice on his part.

Both the press and public came to accept the fact that the evidence against Blaikie was overwhelming and the trial would only be a formality. Nevertheless, representatives of the press, radio and T.V. attended the trial daily and reported a blow by blow description of the proceedings.

Two weeks into the trial, the roof fell in on the prosecution when the trial judge granted the defense a mistrial on the basis that Attorney Richmond had failed to give the defense incriminating statements allegedly made by Blaikie to Detectives Moran and Doris. There was, of course, extensive publicity concerning the prosecutor's failure to fulfull her pre-trial agreement which resulted in the defendant's due process rights being violated.

I recall seeing Attorney Richmond on Boston's T.V. Channel 5 that night answering reporter Ron Gollopin's charge that the mistrial was the result of "prosecutorial incompetence".

As a result of our review of the trial's transcript, Mr. Harrington and I believed that the prosecution had failed to come up with a motive for Blaikie to have murdered DeWilde. We were secured in this belief because Attorney Richmond, in her argument opposing the motion for a mistrial, declared that the defendant had been provided with <u>all</u> statements made to the police by Blaikie.

We were therefore, completely taken by surprise when Attorney Richmond advised us shortly before the second trial that Detectives Doris and Moran told her that Blaikie had told them, "I know I had a motive to kill him, I owed him money".

Mr. Harrington and I were convinced that this statement had been recently contrived to buttress the one weakness in the prosecution's case, the motive.

We, therefore, sought to have Attorney Richmond made a witness for the defense prior to the start of the second trial and filed a motion to that effect. (See attached article.)

Attorney Richmond told me that she felt that this motion was a personal affront to her as we were bringing in question her integrity and that she, "would not forget this". In addition, she told Harrington and me that the judge would never grant our motion. She was correct and thereafter Blaikie was eventually found guilty of murdering DeWilde in the first degree. The "additional" statement relating to "motive" was crucial to the finding of "premeditated" murder.

It is my considered opinion that the enunciated ill will that the

Blaikie trial engendered in Attorney Richmond has colored her perception of Mr. Harrington's qualifications for appointment to the Federal bench.

Very truly yours,

Daniel G. Harrington

Daniel G. Harrington

DGH/lg
enc
cc Senator Edward M. Kennedy

PROSECUTOR AS WITNESS—BLAIKIE DEFENSE AIRS STRATEGY

(By Richard Connolly)

Attorneys for James F. Blaikie Jr. filed notice in Norfolk Superior Court in Dedham today that they plan to call the prosecutor as their "chief witness" when Blaikie goes on trial for murder again Nov. 4 in Fall River.

Judge James P. McGuire, who will preside at the trial, was told by Attys Daniel G. Harrington and Edward F. Harrington, who are not related, that they plan to call Special Asst. Atty. Gen. Alice E. Richmond.

Blaikie is accused of shooting his former friend, C. David DeWilde, operator of an auto repair shop in Allston, and burying his body in the basement of Blaikie's former home at 244 Fisher av., Brookline, on Jan. 14, 1975.

Richmond, a professor at New England Law School, prosecuted Blaikie when the case ended in a mistrial Aug. 19. She is directing the prosecution again for Norfolk Dist. Atty. William D. Delahunt.

The lawyers said that in their unusual move they will question Richmond about statements attributed to Blaikie by two Brighton detectives who questioned him 10 months before the body of DeWide was found.

The detectives, Sgt. John Doris and Thomas Moran, quoted Blaikie as saying that he knew at that time that DeWide was dead and that he had a motive to kill DeWilde, although he claimed the victim was alive when the last saw him. At the time, Blaikie allegedly owed DeWilde $6000 and was in serious financial trouble.

Those statements which the detectives claim Blaikie made were not used during the first trial. However, they were incorporated in a long memo which Richmond submitted to the defense after the mistrial and in preparation for the new trial.

In previous documents filed with Judge McGuire, the attorneys Harrington said it was "unbelievable" that such statements allegedly made by Blaikie were the result of the present recollection of the police.

Before Blaikie went on tiral, Richmond, in accordance with an order from Judge McGuire, submitted to the defense what she claimed were all the statements made by Blaikie during the investigation of DeWilde's disappearance. That aspect of the case ended in the mistrial when Det. Moran testified to certain statements not submitted to the defense.

While laying the ground rules for the new trial, Judge McGuire again instructed Richmond to submit all of Blaikie's statements to the defense. When she did so, the defense lawyers discovered statements not given them prior to the first trial.

In papers filed in court today, explaining their intent to call Richmond, the two lawyers said they plan to utilize "this unique knowledge at Atty. Richmond to attack the credibility to the officers . . ."

They said she would be questioned about the "newly discovered statements" which Moran and Doris attributed to Blaikie.

Judge McGuire last week rejected a motion by the Harringtons to order the two detectives to submit to a polygraph test regarding statements they say were made by Blaikie.

The CHAIRMAN. Thank you.

Ms. Richmond, that was a fascinating case, the *Blaikie* case.

Ms. RICHMOND. It was pretty interesting, Senator; yes, it was.

The CHAIRMAN. Is there any case you have been involved in that has been that highly publicized or controversial or consuming since or before?

Ms. RICHMOND. Well, probably not before because that happened pretty early in my career. I think there have been a couple since then that have gotten a fairly high profile publicity, but Blaikie certainly had all of the elements of your basic murder mystery.

The CHAIRMAN. Did you like Mr. Harrington when you were involved in that trial? I mean, I did not practice long. I got here when I was 29, so I was only a defense attorney, public defender, and criminal defense lawyer for about 3 years.

But sometimes you get in cases and you look over there on the other side to the other table, like we do in politics, on occasion, and you either have a view like I do with the boss here where I love

him and disagree with him or like I do with some others on the committee, on occasion, who I look at and I wish I could shoot them, figuratively speaking. [Laughter.]

All kidding aside, you know, from going back and reading the newspaper articles, which I did, it seems like that was like a shoot-out at the O.K. Corral. Was it that way?

Ms. RICHMOND. Well, I do not think it had to be that way. I am not sure the judge who was presiding on the *Blaikie* case would be happy with that characterization of it. I think I had expected to like Mr. Harrington. I had never heard anything about him that would indicate the kind of problems that arose.

I think as a relatively new trial lawyer, my response was that I must be doing something wrong because here is this experienced lawyer really giving me a terrible, hard time, and I could not imagine what it was.

So I guess I do not think that I came into that case expecting to dislike him. In a peculiar way, although I really, truly believe that he is not able to control himself when he gets angry, I think that he does not even necessarily understand or appreciate the intensity and the intimidation that occurs when he starts to lose his temper.

For example, the word used by many, many lawyers to describe Mr. Harrington's outbursts is "frightening," and I think that is right. And so I do not know how to respond to your question except to say that I was involved in many, many trials before the *Blaikie* case. That was not the first murder case I tried. It was probably at least the 10th and I have been involved in many, many trials since that time.

I do not recall a single instance with any adversary I have ever had where the intensity was at that level, let alone the extreme personalization and the insult of the way in which he treated me.

The CHAIRMAN. That was 11 years ago?

Ms. RICHMOND. That was, Your Honor—Mr. Biden.

The CHAIRMAN. You can call me Your Honor. I am flattered by it.

Ms. RICHMOND. I am used to addressing judges.

The CHAIRMAN. I know. I have much too much respect for the bench ever to put me on it. [Laughter.]

The Chairman just said I may end up as judge or President. I had better have better luck as a judge than I had as President. [Laughter.]

Have you had professional contacts with Mr. Harrington subsequent to that trial?

Ms. RICHMOND. Yes, I did. In 1980, I was appointed by Judge Rya Zobel of the Massachusetts Federal District Court to represent an indigent defendant in, at the time, a very highly publicized case. That was tried by Mr. Harrington's first assistant, who is now a U.S. magistrate, and I was one of three lawyers appointed; Mr. Cooley was appointed to—represent another defendant named Myles Connor.

This was the first of the so-called "*Myles Connor*" cases. It was not a murder trial. It was a bank robbery that was being prosecuted as a bank larceny because it was the prosecution's view that there was "insider" involvement. The case was quite controversial at the time because it was alleged that the defendant Connor was

an informant for State law enforcement officials who were supposedly "covering up" Connor's involvement as an accessory to the murder of two girls.

I do recall Mr. Harrington coming into the courtroom while that case was on trial and I do recall a couple of remarks that he made at the time. I chose to think that they were funny remarks, offhanded, and did not take particular reaction to them. But, again, it was this sort of threatening manner which was somewhat off-putting.

The CHAIRMAN. Thank you very much. I have no further questions.

Sir, you are Mr.——

Mr. DONAHUE. My name is Richard Donahue, Senator.

The CHAIRMAN. Mr. Donahue.

Mr. DONAHUE. I have formerly been president of the Massachusetts Bar Association, president of the New England Bar Association. I have served in the American Bar Association House of Delegates for 12 years. I have served on the board of governors of the American Bar Association. I am presently vice-chairman of the American Bar Association's Section on Individual Rights and Responsibilities. I am a member of the council of the Litigation Section. I serve as chairman of the Massachusetts Bar Association's Commission on Professionalism.

The CHAIRMAN. When do you get time to practice? [Laughter.]

Mr. DONAHUE. Well, I do not come in any of those capacities today. I was admitted to practice in 1951. Except for the period 1960 to 1963 where I served in Washington as an assistant to President Kennedy, I have been engaged in trial practice.

I have been involved in judicial selection for about 20 years—judicial selection on State commissions. I have been involved in commissions appointed by Democratic governors, by Republic governors. I have been appointed to the Circuit Nominating Commission by President Carter.

But I first came to know Mr. Harrington in the capacity as chairman of Senator Kennedy's Judicial Nominating Committee. In 1976, Senator Kennedy put together a nominating committee that consisted of lawyers, non-lawyer. It was a broad-based citizen effort at making a determination of the eligibility of people for both district court and U.S. attorney.

I had known Mr. Harrington prior to that time. He was one of the applicants. We examined his credentials. I will be candid to say that in the course of that examination I was aware that he had a temper problem. I was aware that he was considered volatile. I was aware that he was considered combative, that he was considered aggressive.

His background was, however, as a prosecutor, and his background was such that although I had some misgivings about it, I did not feel that it disqualified him for the office of U.S. Attorney.

He became U.S. attorney, and as will in those matters, because I was in some way the author of the nomination among the bar, I never get the credit, but you always get the brick bats. Very early on, I heard stories of short-tempered, explosive behavior and although I discounted it, I was somewhat disconcerted.

I had a specific experience with him, however, which changed all of that and made me not just a bystander but an absolute observer. I was defending a man by the name of Stanley McNiff, who was one of seven defendants in a mail fraud scheme. He was incidental, or at least he was peripheral to the overall operation, except for the testimony of one government-protected witness by the name of Leo Power.

Leo Power was government-protected; he was in custody, he was not available for access, he was not available for any interview on behalf of the defendant. On the 9th day of trial, Leo Power while testifying and under cross-examination by me was examined with reference to State crimes which he had committed.

It was clear in the course of that examination that Mr. Power thought that his grant of immunity from Mr. Harrington made him immune from State crimes. When it became clear that it did not, the judge stopped the proceeding. He appointed a separate lawyer for Mr. Power and he explained to Mr. Power in the presence of his lawyer that the U.S. attorney could not grant immunity for State crimes, and that therefore he should listen to his lawyer.

Well, that was a Friday. On Monday, Mr. Power appeared back on the stand with his lawyer, who said that he had explained all of the circumstances to him; that he understood his rights; that he was freely, knowingly, and willingly waiving his rights and he would appear to testify.

The only thing that I can tell you that was unique about that in my experience was that on that day when Mr. Power resumed testimony, Mr. Harrington was in the courtroom. I had not had the experience of the U.S. attorney being in the courtroom, and so I marked it as something unusual, but I did not credit it other than something that I noted.

Mr. Power continued to testify; he testified freely. My client was convicted. The case went on appeal to the circuit court. Thereafter, three motions for new trial were filed, basically based upon the fact that materials were withheld, and although admonitions were raised, the court basically found that the material did not rise to the level that would grant a new trial.

However, in August of 1980, Mr. Power contacted my client. My client and his wife met with not Mr. Power, but with his wife, and she gave an affidavit which became part of the record and she says that on Thursday, March 29, which was Thursday night, the assistant U.S. attorney told her to go home. On Friday, the assistant U.S. attorney called her and told her to get back to Boston right away and talk some sense into Leo. He just stopped all the proceedings.

On arrival, she met with U.S. Attorney Edward Harrington and Mr. Kelly. Both were upset that they were not able to speak to Mr. Power. I must say that at the time that counsel was appointed for Mr. Power, the judge put a special admonition that there was to be no contact with the witness; that the witness was totally embargoed and there was no way that any contact should be made with him at all; that Mr. Stein was now his counsel.

And Mr. Harrington told Ms. Power that if Mr. Power did not testify, Mr. Harrington would make sure that Mr. Power was sentenced to 15 years imprisonment. Mr. Harrington further stated

that he would pursue Mr. Power to the ends of the earth if Mr. Power maintained his refusal to testify.

Ms. Power was then taken to a hotel where she was importuned to persuade her husband to testify, and on Monday Ms. Power met with Mr. Kelly and Mr. Harrington. After Mr. Kelly had gone to the courtroom, Ms. Power told Mr. Harrington that Mr. Power was going to testify.

Mr. Harrington immediately left for the courtroom and told Ms. Power that he wanted to be present in the courtroom so that Mr. Power would see him to make sure that he testified.

Now, part of that affidavit has been filed as a motion for new trial. Ms. Power was not available; Ms. Power would not be available. They are still government-protected witnesses.

Lo and behold, in the back of the record which I have provided for the court, arrived a statement signed by Ms. Power and entered by the judge in December of 1980 basically confirming that contact has been made.

What does that mean? That means that when there was an order of the court that there would be no contact that the U.S. attorney and the assistant U.S. attorney, in contempt of that order, in violation of that direction, contacted and indeed intimidated a witness.

The CHAIRMAN. Contacted Mr. Power or Ms. Power?

Mr. DONAHUE. Ms. Power.

The CHAIRMAN. Ms. Power?

Mr. DONAHUE. Ms. Power.

The CHAIRMAN. She was not a witness?

Mr. DONAHUE. That is right, but to use her to persuade Mr. Power and to direct all of the intimidation through her to him.

The CHAIRMAN. Well, that may be, but let us be precise here. Was there an order saying that the U.S. attorney could not contact Ms. Power?

Mr. DONAHUE. No, but there was an order that there could be no contact with the witness without the permission of Mr. Power's then attorney, Mr. Stein. Now, Mr. Stein is not aware of any of this.

I suggest to you that I cannot confirm that any of these things happened in exactly this fashion because, clearly, I cannot contact Ms. Power. I do not have access to her. No hearing has ever been held.

If indeed what she says and appears here is true, the question is not Mr. Harrington's eligibility for the district court. His license to practice is in question. This is so violative of everything that we stand for as professionals that no one who traffics with this type of thing is entitled to be a member of the bar.

Now, I have raised all of those issues. No hearing has been granted.

The CHAIRMAN. What happened? What did the court decide on appeal?

Mr. DONAHUE. The court on appeal denied it.

The CHAIRMAN. I assume it was appealed.

Mr. DONAHUE. Yes, it was appealed, but the court refused to allow the statement of Charlotte Power to be added to the record, even though it was entered in the record, or to be argued from. So it stays there.

The CHAIRMAN. Why?

Mr. DONAHUE. Well, I do not know, I do not know, but it is like the fish in the sun on the dock; the longer it stays there, the more it smells. It is an extremely egregious conduct.

Now, obviously, my interest which may have been piqued before was not only heightened at this time; it became something with which I was grossly concerned. I therefore paid heed to what people said and I was conscious exactly of what Ms. Richmond has testified to that he is, out of all order, short-tempered, that he is volatile, that he is explosive, and that he is explosive beyond the reasonable range of the combat that goes on in the courtroom.

That is what we do for a living. We have to deal with conflict. We have to deal with conflict, but we deal with one another. The personalization of every contact, the general knowledge of it, is so broadly understood in Massachusetts, and yet the timidity of the bar is in ways so embarrassing to me that I felt it incumbent on me to come here to testify.

I can recount, as Ms. Richmond has recounted, the contacts I have had by members of the bar suggesting that this would be a dangerous nomination; that this would be an absolutely inappropriate choice. I have asked them if they are going to make their views known to the committee.

The CHAIRMAN. As you have already observed by now, we allow hearsay here, but we, in fact, treat it as that, also.

Mr. DONAHUE. I appreciate that and I understand fully, and therefore I will not indulge myself in the reporting of anecdotes that have been reported to me because I do not know of them other than I respect the lawyers who tell me.

I recognize that in the trial of criminal causes, tempers run high, that results are unsatisfactory, and that people may disagree; not in this instance.

The CHAIRMAN. Well, how would you respond to the—and obviously I have no brief for or against Mr. Harrington at this point. He is not my nominee. As a matter of fact, he made a serious mistake. He switched parties, as far as I was concerned, so there is nothing in him other than trying to get to the facts here.

How would you respond to the assertion of sour grapes; that you lost and——

Mr. DONAHUE. This is not a—I have got to be candid with you, Senator. I have lost. I mean, this is not the first case I have lost, and I have won, but I have no case where I have left so much that I cannot resolve in my own mind as to whether fairness was done.

This is not a question whether or not Mr. McNiff received a fair trial, because the court has made a fair determination that, for whatever reason or whatever standard, he received as fair a trial as he can.

As I proceeded on the grounds of the fairness of his trial, I find prosecutorial misconduct. The test here is not whether or not Stanley McNiff received a fair trial. The testimony is whether or not Edward Harrington violated the court's order, and I cannot——

The CHAIRMAN. Well, you have no order from the court saying that he violated the order. You are giving us your judgment that based upon what you believe to be the facts, he violated the court order. Yet, there is no court order—even though you raised it with

the court, I assume—no court ruling that he did, in fact, violate the court order. Is that correct?

Mr. DONAHUE. No, that is not correct. I have raised that issue. The fact is that they said it was based on hearsay, but yet they will not accept the statement of Charlotte Power and enter it into the record, which is not hearsay.

The CHAIRMAN. Well, that is my point. Even though a witness is in the witness' protection program, they are not beyond the reach of the court. They are beyond the reach of you——

Mr. DONAHUE. That is right.

The CHAIRMAN [continuing]. And beyond the reach of others. And my question is that, as I understand it, you raised the issue of impropriety, violation of the court order of indirectly contacting Mr.—what was his name again?

Mr. DONAHUE. Power.

The CHAIRMAN. Mr. Power, through his wife, and you raised that with the court and the court concluded that it would not accept hearsay and would not take the time, which they had the ability to do, to actually ask Ms. Power if that were true.

Now, how do you explain that? I am just curious.

Mr. DONAHUE. It is unexplainable to me; it is unexplainable to me because it is not a difficult hearing. Let me just set for you——

The CHAIRMAN. I agree. You do not have to; I understand how it would work. That is what confuses me. It is not a difficult hearing. It did not occur. It means one of three things. Either the court did not believe there was sufficient reason to call Ms. Power or the court was corrupt and exerted as much impropriety as you allege Mr. Harrington did or they were stupid, one of the three, because it is not a complicated process. That is why I raise the question.

Mr. DONAHUE. Well, I certainly would not accept either of the premises that the court was corrupt or, indeed, that the court was stupid. I might suggest that in the volume of materials that were presented to the court, the court may not—there is some confusion in the memorandum because Mr. Power has two wives and one was involved in a previous motion and there seems to be some suggestion that there was a confusion of the identity. But I cannot——

The CHAIRMAN. I am not questioning your recollection. I am not suggesting that you are not motivated properly by appearing here. I am just trying to get to what otherwise would have been, I think, a relatively easy thing for the court to resolve and I am confused why they did not.

Mr. DONAHUE. There is no question about it.

The CHAIRMAN. But I thank you very much for your testimony, and I would suggest as a member of the bar, I share your feeling about the courage of the bar. And you indicated that you could recite, but you refrained from, incidents where people you respect have had encounters with Mr. Harrington.

I suspect and hope you will respect them less now than you did when they told them to you, since they did not have the courage to come and say them themselves. I would hope that that is the case because I find that we tend to be, we who practice law, and I have not done that in a while, not very courageous when it comes to testifying against one another and/or being candid about what our

views are of prospective nominees. We are rivaled only by doctors. [Laughter.]

But I will yield to a non-doctor, but the boss here, Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

I have a letter here that is written to Senator Leahy by Mr. George F. Kelly. He was the deputy chief of the strike force, I believe, at one time, and I might just read a portion of it:

> During his cross-examination, the witness stopped testifying and was provided counsel to advise him with respect to the scope of immunity he had been given. Because the chief of the strike force was unavailable, I sought the assistance of Mr. Harrington. It would have been extremely difficult to process an immunity request given the time constraints and, moreover, it would have been extremely harmful to the case to have the jury perceive that the United States has somehow given the witness a better deal at his insistence.
>
> Mr. Harrington agreed with me and told the witness' counsel by way of the telephone in my presence that the witness had already been provided substantial benefits in exchange for his promise to provide full and truthful testimony at trial; that the government would continue to be bound by its promise of immunity.
>
> Mr. Harrington also advised the witness' counsel that the government's promise of immunity was conditioned on the witness' complying with his promise to testify on behalf of the United States and should he fail to testify he would be prosecuted for his part in the fraudulent scheme.
>
> The witness, after consulting with his counsel, agreed to resume the witness stand and finish his testimony. At the close of the evidence, the jury returned verdicts of guilty against all defendants. The propriety of the government's handling of the witness' hesitancy while testifying was the subject of post-trial motions and a hearing. The trial court upheld the convictions and rejected the defendant's complaint concerning the government's handling of the witness' hesitancy. The case was then given a full review in the first circuit court of appeals, where all the judgments of guilty were affirmed.
>
> I hope that this discussion of the *Ciampaglia* case will assist you, the members of your committee, and the Senate in coming to what I hope will be a speedy and unanimous confirmation of Mr. Harrington.

I just wanted to bring that to the attention of the record. Do you have any comment on that?

Mr. DONAHUE. It is just irrelevant. I mean, the question that he raises in that paragraph that you read does not relate to his own contact directly with the defendant, and it is irrelevant.

Senator THURMOND. That is all, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you both.

Senator THURMOND. Thank you.

Mr. DONAHUE. Thank you.

The CHAIRMAN. Mr. Harrington, please. He was sworn?

Senator THURMOND. He was sworn before.

Mr. HARRINGTON. I have not been sworn.

The CHAIRMAN. He should be sworn again?

Senator THURMOND. Were you sworn when you first testified?

Mr. HARRINGTON. I was.

The CHAIRMAN. Consider yourself still sworn, right, boss?

Senator THURMOND. That is right.

The CHAIRMAN. What do you have to say, you hot-tempered person, you? You are not going to get mad at us, are you?

TESTIMONY OF EDWARD F. HARRINGTON, NEEDHAM, MA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF MASSACHUSETTS

Mr. HARRINGTON. I will not.

First of all, I want to thank you, Mr. Chairman, and the members of the committee for giving me this rehearing in an expeditious fashion. It has relieved me and my family of the burdens of anxiety and the long wait.

The CHAIRMAN. Well, it is not just the two of us. Senator Kennedy asked whether I would hold this hearing, and others have wanted to give you the opportunity, and that is why we are doing it.

Mr. HARRINGTON. Thank you.

Secondly, I want the record to be made clear that I have the highest respect for both witnesses who appeared before me. I understand in the course of litigation sometimes people see things from different points of view. I am sorry that they see it from a different point of view from mine. However, I respect their position.

With respect to Ms. Richmond's allegation, that was a hard-fought trial and retrial. It was a highly publicized case. I just want the record to show that the words attributed to me were never said by me; that I can say in all honesty that the word has never been used by me in my entire life, publicly or privately. I attribute her false accusation to a faulty memory based on the passage of 11 years.

I think it should be noted that in 1977 when I was selected as U.S. attorney by Senator Kennedy that this allegation was not raised. And I would moreover say that I only entered that trial at the eve of the first trial, but I was not the chief attorney and when I did enter upon my engagement for that indigent defendant, the relationship between Ms. Richmond, representing the Commonwealth, and Daniel G. Harrington, representing Mr. Blaikie, was one of absolute antagonism, and that during the course of the two trials I would say that I acted as a peacemaker and as a conduit of information.

With respect to Mr. Donahue's allegation, again, Dick Donahue and I have been friends for a very long period of time. In 1977 when he chaired Senator Kennedy's ad hoc committee to pick the U.S. attorney at that time, he was not only the chairman, but he was my most vigorous supporter.

With regard to the *Ciampaglia* case, one thing should be noted, that it was not a U.S. attorney's case, but it was a strike force case, an organized crime case, of which I had nothing to do with.

One afternoon while I was in my office, George Kelly came down to see me. He was the strike force attorney who was trying the case. He advised me that the strike force attorney in charge was without the jurisdiction and that with the permission of Judge Mazzone, he had been in contact with the witness, Leo Power's lawyer.

He said since I was the leading representative of the United States, Mr. Kelly requested that I convey the position of the United States with respect to the granting of formal-use immunity, which I did, as recounted in Mr. Kelly's letter not to the witness, but to the witness' attorney.

I never spoke with the witness, Leo Power, at any time before he was released as a witness from that case, and my contact with the wife was, I think, on two occasions during the course of that trial

exclusively not with respect to Mr. Power's testimony, but again at the request of Mr. Kelly, who was tied up in the case, to represent to Ms. Power what the government would do to alleviate problems that she was having due to the witness protection program.

So I want it to be clear that I did not threaten Mr. Power, because I never spoke with him. I never threatened his wife, nor his attorney. But my only contact with respect to the particular legal issue was with Leo Power's attorney, and I am sure that this honorable committee could contact Marshall Stein and I am sure that he would support my statement here today that I made no statement in the nature of a threat of any sort.

The CHAIRMAN. You ran for attorney general?

Mr. HARRINGTON. I did.

The CHAIRMAN. Did you lose your temper during the campaign?

Mr. HARRINGTON. I ran twice. I ran in 1974 and I ran 17 months, and I ran in 1986 when I ran 29 months, and I would say in all honesty I did not, and those who worked on my campaign, I think, would verify that.

The CHAIRMAN. You are a better man than I am. I have a lot of questions, but let me yield to Senator Thurmond.

Senator THURMOND. Mr. Chairman, I have no questions. I think he has explained the matter.

The CHAIRMAN. Let me ask you, at any time during the Blaikie trial did you raise your voice to the prosecutor out of the courtroom?

Mr. HARRINGTON. I do not think I ever raised my voice, but I would say this, that on one occasion during a lunch room break I did, in fact, make a caustic remark to Ms. Richmond. It was not raised in any outburst of temper, but was, in a sense, a wistfully ironical remark which I thought was kind of a joke in the context in which it was raised.

During the course of those two trials, that was the only indication of any confrontation between Ms. Richmond and myself. Whatever antagonism there was between the lawyers for the parties was not me.

The CHAIRMAN. Excuse me a moment.

Did you, during your 1986 campaign, have a run-in with your opponent's aide, one of your opponent's campaign workers, accusing him of tampering with court records?

Mr. HARRINGTON. I did not, I did not.

The CHAIRMAN. Did you have any encounter with——

Mr. HARRINGTON. I know what you have reference to. During the last week of the campaign, there was an allegation made that how could Ted Harrington run for attorney general if he failed to meet a court appearance. That came out on the Monday in the last week of the campaign.

On the next Sunday, Jimmy Shannon and I were appearing on a TV debate and on the way into it I ran into Jerry Fitzgerald, Jimmy Shannon's campaign manager, and in a jocular manner I said to Jerry, Jerry, stop changing court documents, as a joke, just as a pleasantry.

And I think Jerry—from what I gather, he did not take it in the proper vein, but it was not said with any meanness. It was said, I would think, or as I meant it, as part of the by-play of politics.

The CHAIRMAN. I do not think there would be anything wrong with it if you said it seriously.

Mr. HARRINGTON. Well, I would——

The CHAIRMAN. I will tell you what my doubt is, quite frankly, Mr. Harrington. Two reputable attorneys have indicated you have a temper. Others without the courage to testify allege that you have a temper.

I think it is hard for people not to have a temper. I do not think the fact that someone has a temper is disqualifying if, in fact, it is not something that is not controllable. I mean, everybody loses their temper somewhere along the line. It is one thing if it is a pattern that exists throughout your career and personal relationships.

I do not know anybody who has not lost their temper. I remember the boss here and Senator Muskie when he was on this committee on occasion losing their tempers. I watched with regularity Senator Kennedy and Senator Thurmond lose their temper. I never lose mine, but——

[Laughter.]

The CHAIRMAN. I am being serious now. The only little doubt I have about your testimony is you act as though that has never happened with you. In terms of credibility, we are sitting here like you will as a judge assessing the credibility of witnesses.

I mean, I can imagine the last week of a campaign walking in and a guy or a woman of another age making some accusation that was not true and saying it caustically. I can imagine anybody walking in and saying, hey, Charlie, nice job; you tried to change the records, you jerk, but it did not work and let us go debate.

I mean, that is different than walking in and grabbing him by the necktie or something.

But you make it sound like everything was always—you know, you walk in at the end of a campaign and you said kiddingly—you know, he did not have a sense of humor—golly, you know, you changed that record over there; that is a funny joke.

Do you not ever get angry? Forget losing your temper. Do you get angry?

Mr. HARRINGTON. I think there is a distinction.

The CHAIRMAN. So do I.

Mr. HARRINGTON. I think I have been in the course of my career, which is 27 years—16 years as a prosecutor and 11 on the defense—I have been involved in almost every major public corruption and organized crime case developed in Massachusetts over the past 20 years. I have been in very many controversial defenses of major criminal trials.

I think people would characterize me as an aggressive trial lawyer, but I am not one that usually or, for that matter, many times in my life has absolutely flown off the handle and lost my temper.

My remark that I referred to to Ms. Richmond or my remark to Jerry Fitzgerald were more in the nature of being a wisecrack than losing one's temper. It might be an indication of an aggressive attitude, but it was not flying off the handle, as I was interpreting the term "hot temper."

The CHAIRMAN. Let me explain what I mean by temper and then I will stop. I, like you, ran for an office I did not achieve. I, after

having been on the campaign trail for a while, in a hot kitchen with television lights on, with the flu—someone says where did you end up in your law school class?

I went like this, I said come on out here. Everybody could tell by the tone of my voice I was angry. I did not lose my temper and hit anybody. I said come on out here. I said do you want to compare IQs—a foolish, embarrassing thing to say. That is what I call losing my—maybe I should say I got angry.

Mr. HARRINGTON. I have done that.

The CHAIRMAN. When you said you made a caustic remark to Ms. Richmond, what was the remark? Do you recall?

Mr. HARRINGTON. I do. Could I give you the context before I say it?

The CHAIRMAN. Sure, please.

Mr. HARRINGTON. And I will say it quite briefly. The first trial ended in a mistrial because of the failure of Ms. Richmond to turn over statements of the defendant, as required by a pre-trial agreement—whereupon the superior court declared a mistrial.

During the course of that argument, Ms. Richmond represented to the judge that, although the statement that was made, that had not been turned over, was implicit in that which had, at least at this time the defense had all statements that the defendant made.

Lo and behold, a couple of weeks before the retrial two new statements appear; never had been turned over prior to the first trial, and contrary to her representation.

The CHAIRMAN. But she did turn them over?

Mr. HARRINGTON. They had been turned over, but she said that they had not been in existence.

The CHAIRMAN. Got you.

Mr. HARRINGTON. What did we do? One of the statements related to the issue of motive. It was the only area of the case where we were able, if we could, to reduce an overwhelming amount of evidence from first-degree murder to second, and yet now we find ourselves with a statement relating to motive, Blaikie allegedly saying to the police I know I had a motive to kill him.

We urged the court to put Ms. Richmond on the stand to raise the suggestion of recent fabrication of this crucial statement, in view of the fact that she had represented to the court that no such other statement existed. The court denied our motion.

One day at the lunch break after the court denied our motion to put her on as a witness, she came into the lunchroom, and I was reading the sports page and I can recall it. And in a mocking, taunting manner she said, I knew the judge would not make me go on the stand.

And I knew this, that my client, at least in my estimation, had been deprived of a constitutional right under *Brady* v. *Maryland,* and so I said—and I am sorry I said it; I was sorry the next day when I apologized. I said, Alice, you may not have to go on the stand as a witness, but you are still a lying bitch.

I said that; I felt bad when I said it. I apologized the next day, and that is the only untoward remark I ever made towards her. I am not proud of making it, and publicly I will apologize again to her, but I thought that her statement or her attitude was out of

order when she was gleeful at depriving my client of what I thought was a constitutional right.

The CHAIRMAN. That explains a lot to me. I have no further questions.

Any further questions?

Senator THURMOND. I might just ask you this question. If you should be confirmed by the Senate, do you feel that you can exercise the proper judicial temperament and restraint and treat lawyers, jurors, and people around the courtroom and other people with respect and say nothing that will be out of order?

Mr. HARRINGTON. I do, and I think that this judicial selection process has focused in on the frailties that we all have and I suppose I have with them. And I will be ever mindful that there are some people who might feel that I was too aggressive as an advocate, and I will be vigilant in maintaining my composure throughout the rest of my career.

Senator THURMOND. I can remember when I was a defense lawyer, too, defending people charged with murder and other crimes, and very aggressive, and someone might have accused me maybe of losing my temper. But later after I became a judge, I was in a different world. When you put that robe around you, there is just something that comes over you. It is a different world entirely.

I just wondered if you felt that if you became a judge that you could exercise the right restraint.

Mr. HARRINGTON. I am convinced I can, Senator.

Senator THURMOND. That is the only question I have.

The CHAIRMAN. I want to note when the robe came off, he became aggressive again. [Laughter.]

I thank you very much, Mr. Harrington.

Mr. HARRINGTON. Thank you, Mr. Chairman.

The CHAIRMAN. I have no further questions.

Mr. HARRINGTON. Thank you, Senator.

The CHAIRMAN. You are excused, and I appreciate your coming back. I thank all the witnesses who testified for and against and we are going to try to move expeditiously. Thank you very much.

Mr. HARRINGTON. Thank you.

The CHAIRMAN. Is Mr. Carfora in the hearing room?

Mr. CARFORA. Yes.

The CHAIRMAN. How are you, Mr. Carfora? We are waiting for Senator D'Amato to introduce the nominee, but in the interests of your time and the committee's time, why do you not come forward and be sworn and we will take your testimony—I beg your pardon. If you would withhold, Senator D'Amato is here. I appreciate him making the effort.

Welcome, Senator.

Senator D'AMATO. Mr. Chairman.

The CHAIRMAN. We are pleased to welcome before the committee our distinguished colleague from New York, Senator D'Amato.

I should note at the outset there is a statement of support submitted by your senior colleague, Senator Moynihan, which we would enter in the record after Senator D'Amato's testimony.

Mr. Conboy, it is pleasure to have you here.

Mr. CONBOY. Thank you, sir.

The CHAIRMAN. And you understand the procedure. We have your distinguished friend introduce you and then we understand your busy schedule; you are welcome to stay after that, but we understand if you have to leave. Then we will go to you, Mr. Conboy.

Mr. CONBOY. Thank you.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Mr. Chairman, thank you for the opportunity to be here before this committee with you and our distinguished friend and senior Senator from South Carolina, Senator Thurmond.

Indeed, Mr. Chairman, it is a great pleasure for me to present to this committee someone whom I have come to know professionally and come to admire, and he has become a very good and dear friend.

One need only look at his résumé to see the caliber and quality of his service. From graduation day at Virginia Law School—from that point on, in 1964, you could literally say that Ken Conboy's life has been devoted to public service; his years in the service in Vietnam, leaving with the rank of captain after 2 years. He then entered one of the distinguished and great offices, rising to the position as chief of the Rackets Bureau under two of the preeminent law enforcement officials of this Nation, and I talk about the distinguished Frank Hogan, who was legendary, as you know, Mr. Chairman, as the district attorney of Manhattan, followed by Robert Morgenthau.

It is a record that continues, public service calling him. He continues as deputy commissioner and general counsel to the New York City Police Department, where he served for 6 years, and then 2 years as the New York City criminal justice coordinator where he worked with Congressman Rangel and myself and others in the most inspiring way to see to it that the assets and resources of our city were marshaled in a coordinated effort, as it related to drug seizures, the drug task force, the mayor's position, Mayor Koch's position, in attempting to marshal and galvanize the forces of our U.S. Government in interdicting drugs at the borders.

Ken Conboy was the legislative architect of many of the mayor's proposals—proposals, Mr. Chairman, that you and Senator Thurmond helped champion and bring into law. For the past 2 years, he has made a great sacrifice and has undertaken since February of 1986 the very responsible and sometimes thankless position of Commissioner of Investigations for the City of New York.

It was no accident that Mayor Koch called upon him to undertake that position because it called for a man of immense integrity, ability, and dedication during these rather difficult times, in which we have seen the city besieged with a number of corruption cases that have boggled the mind.

And so, Mr. Chairman, it is with great affection and a great sense of honor that I present to you and to this committee Kenneth Conboy, who I believe will be one of the great judges in our Federal judiciary.

I commend the President for having seen the wisdom of recommending him and placing his name before our Senate, and I hope

that we have speedy confirmation. I am sure that he will continue in the exemplary public service that he has demonstrated since graduation in 1964.

[The statement of Senator Moynihan follows:]

STATEMENT BY SENATOR DANIEL PATRICK MOYNIHAN ON NOMINATION OF KENNETH CONBOY TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. Chairman:

I am pleased to join Senator D'Amato in supporting the nomination of Kenneth Conboy to the United States District Court for the Southern District of New York.

Commissioner Conboy has a long history of service to the State of New York. From October, 1966 to February, 1977, he served in the Manhattan District Attorney's Office, where he was Trial Assistant, Executive Assistant District Attorney, and Chief of the Rackets Bureau. During this decade, Commissioner Conboy prosecuted crime figures for a number of offenses, including extortion and the "fixing" of sports events.

Soon after departing the Manhattan District Attorney's Office, Commissioner Conboy returned to aid New York City in fighting crime to serve as Deputy Commissionor and General Counsel to the New York Police. Here he advised the Police Department on the constitutional rights of individuals, the scope of police power, patterns of criminal conduct and how to stop it, and the appointment of minority candidates to the force.

In 1984, Commissioner Conboy moved on to become the Criminal Justice Coordinator for New York City where he advocated reforming the City's probation services and expanding the City's jail facilities. In a time of unbearable and

untenable prison overcrowding, his efforts should not go unnoticed.

Commissioner Conboy and I agree that we must try to alleviate prison overcrowding, On the first day of the 100th Congress, I introduced three bills designed to ease the prison crisis. S. 47, the Drug Offender Incarceration Act, recognizes the connection between the crackdown on drug-related crimes and prison overcrowding. It establishes a grant program to build additional prison facilities or to expand already existing facilities to alleviate overcrowding. To do this, it provides $50 million for prison construction to the states with the greatest need. Arresting drug criminals and keeping them off the street is a major part to fighting the drug war. This bill will complement that effort.

In conjunction with this effort, I have also introduced S. 48, the Criminal Alien Departure Act of 1987. Illegal aliens arrested and convicted of crimes are putting a great strain the prison system. For example, New York City jails currently house 13,524 inmates, and the NYC police estimates that 2,000 to 2,500 are illegal aliens. Simply stated, S.48 will create more jail space by deporting illegal aliens who have been convicted of drug-related crimes. A record will be kept of those individuals who have been deported to ensure that they cannot re-enter this country.

Finally, I have also proposed S.49, the Prison Conversion Act of 1987. The solution to the overcrowding problem is simple: expand existing facilities and build more prisons.

This bill will permit and encourage the use of federal surplus property as correctional facilities for the next 2 years.

Efforts at the Federal level must be combined with those at the local level and that is where Commissioner - soon to be Judge - Conboy has been so valuable.

Today, Kenneth Conboy continues to serve the state of New York as New York City's Commissioner of Investigation. He has taken swift action in addressing the recent municipal corruption practices by initiating a complete reorganization of the Department of Investigation in order to see that it ran more efficiently.

An impressive professional record indeed. But Commissionor Conboy's contributions extend beyond the scope of legal duties. He established a program with Catholic Charities of the Archdiocese of New York with an intent to help disadvantaged teenagers. He directed the Catholic Interracial Council from 1985 to 1987 in an honest attempt to promote more harmonious race relations; and he coordinated a program for the sheltering of homeless persons.

Again, I urge the confirmation of Kenneth Conboy to the United States District court for the Southern District of New York.

The CHAIRMAN. Thank you, Senator.

One thing for sure, your temperament will not be in question. Anyone who can work for Mayor Koch obviously does not have a temper.

Do you have any of your family here, Mr. Conboy?

Mr. CONBOY. Yes.

The CHAIRMAN. Would you please introduce them?

Mr. CONBOY. Mr. Chairman, I would like you and the committee to meet my brother, Brian, who was for 6 years a senior adviser on Senator Javits' staff, and also he was a special assistant to Attorney General Katzenbach; my sister, Patricia; Brian's wife, Lucy; and my dear friend, Peg Breen.

I also would like to say, sir, that I am immensely grateful to Senator Alfonse D'Amato for the encouragement and the support he has given me in the pursuit of the nomination.

I would like to dispense with the submission of a formal statement other than to observe that it is a great honor to have been nominated by the President, and it is a further honor to submit to your questions with respect to my nomination.

I view this as the great opportunity of a lifetime, and if I am confirmed I promise you and the committee and the Senate that I will discharge my duties conscientiously and fair-mindedly.

The CHAIRMAN. It is very useful to have Senator D'Amato as your ally. It is almost as useful to have Father Healy calling, too. [Laughter.]

Would you stand and be sworn?

Mr. CONBOY. Yes, sir.

The CHAIRMAN. Do you swear the testimony you are about to give is the whole truth and nothing but the truth, so help you God?

Mr. CONBOY. I do, sir.

The CHAIRMAN. I yield to my colleague from South Carolina.

Senator THURMOND. I just want to congratulate you upon your appointment by the President. This is a very important position and I am sure you will live true to the trust reposed in you as exemplified by your past record.

I also want to congratulate you for having Senator D'Amato come here in person and make an appearance. He is a very influential member of this body and a very fine Senator. I congratulate you, also, on having your other New York Senator to endorse you.

TESTIMONY OF KENNETH CONBOY, NEW YORK, NY, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. CONBOY. Thank you, sir.

The CHAIRMAN. Senator D'Amato and I only have one regret with regard to your nomination, Mr. Conboy, and that is as a New Yorker you chose to leave the State and go to law school somewhere else instead of Syracuse, but that will be forgiven.

I do have some questions for you.

Mr. CONBOY. Yes, sir.

Senator D'AMATO. Mr. Chairman——

The CHAIRMAN. Please. I understand your schedule is as busy as ours, so thanks for taking the time out and coming over.

Senator D'AMATO. Thank you, Mr. Chairman.

Senator THURMOND. Thank you very much for coming over, Senator.

The CHAIRMAN. Mr. Conboy, before we begin, I would like your commitment under oath that you would never exchange robes with your brother when you want vacation time, because he could pass as your twin, if he is not your twin. You do swear that you will preside and not your brother?

Mr. CONBOY. He is a twin, Senator. I think he might be able to discharge the duties better, but I make the commitment to you that we will not do that switch.

The CHAIRMAN. All right.

It is clear you have had a very distinguished career in public service and you have served as assistant district attorney in Manhattan and headed the Rackets Bureau in that office.

You later served as Deputy Police Commissioner for Legal Matters and counsel to the police department. Four years ago, Mayor Koch named you Criminal Justice Coordinator, and last year the Mayor asked you to take over as head of the city's Department of Investigation.

Since I have been in the U.S. Senate, I have made particular note of criminal issues myself, and many of my colleagues and I have pressed for passage of the 1984 Comprehensive Crime Control Act and the Anti-Drug Act of 1986. It is therefore a pleasure to see someone with your interest in this area.

What do you perceive from your experience as the number one crime problem in the New York area?

Mr. CONBOY. Senator, there is no question that the principal problem in New York City and, I think, all major cities in America is the widespread availability of dangerous drugs, and particularly in New York City, a burgeoning cocaine problem that is manifesting itself in almost every aspect of municipal life.

We have a desperate condition in our schools. We have large amounts of students who are addicted at a very early age. We have a problem in the municipal workforce of New York City, a problem that I became acutely sensitive to as Commissioner of Investigation.

We have, as you may know, initiated mandatory testing in certain areas, and these orders of the mayor are now under challenge in the courts, both in the State and Federal courts.

The principal difficulty with crime, in general, is that about 65 percent of it, according to both the FBI and the New York Police, is drug-related. So we are building prisons at an immense clip in New York. Governor Cuomo has committed $700 million to new jail construction. The mayor has committed 300 million. That is $1 billion in jail construction in New York City and State in just the last 3½ years.

The governor and the mayor have repeatedly had to justify this immense investment, and in spite of that investment we are confronted with new litigation in the district court with respect to jail overcrowding.

You may have seen in the New York Times the initiative of the mayor to acquire barges, some British barges, floating barges, to take less serious offenders who nonetheless have very long criminal

records and relieve the pressures on the State prison system and in Riker's Island.

At the core of all of this is narcotics, and the U.S. attorney has attempted to help. He has had what is known as Federal Day in the Southern District of New York where on every fifth day the Federal prosecutor takes the lead in prosecution of the narcotics matters that are executed jointly with the joint task force, which is the DEA and the New York Police.

So, in summary, it is an immensely daunting problem. It is one that is constantly at stage center in New York both for the governor and the mayor, and this is why, for example, we were so anxious to support Congressman Bennett's proposal in the last Congress to obtain better coordination with the Coast Guard and, secondarily, with the armed forces on the flow of narcotics principally in the Long Island, the Kennedy Airport, and the New York metropolitan region.

And I must tell you it is discouraging. I hopefully will be leaving law enforcement, and the problem seems to have become evermore worse than when I first started as a young assistant district attorney in 1966.

The CHAIRMAN. Let me ask you about your judicial philosophy.

Mr. CONBOY. Yes.

The CHAIRMAN. You have been characterized to me as a conservative. You have been characterized to me as someone who is strong on law and order issues. Do you believe that the Supreme Court rulings that are presently in effect relating to the rights of the criminally accused should be changed?

Mr. CONBOY. Senator, I think my first comment on this would be I do believe that, in general terms, the judicial branch should defer to the political branches. I think that judges ought not to be philosopher kings; they ought to be adjudicators of concrete disputes.

That being said, I share the point of view of Judge Winter in the second circuit that judges sometimes must make policy. They ought to do it only when they have no choice and, of course, this is largely out of the hands of district court judges.

I am committed to the concept of stare decisis. I believe that district court judges have an absolute obligation to the litigants, to the Constitution, and to the court to follow the law as it has been set down by the circuit courts and the Supreme Court.

Now, that having been said, I have expressed my views publicly on some matters of criminal procedure; for example, the exclusionary rule. I do believe in the good-faith exception to the exclusionary rule. This, I suppose, has been the major criminal justice discussion at the constitutional level and the colleges and even, indeed, in the Congress in the last 3 or 4 years.

Here is the reason for it——

The CHAIRMAN. That is all right. I do not care what the reason is. What I am trying to drive at is whether or not in the absence of a Supreme Court decision or a change in the law relative to the exclusionary rule, would you apply the rule as it is now?

Mr. CONBOY. Absolutely, absolutely.

The CHAIRMAN. You have no doubt what it is now, do you?

Mr. CONBOY. None.

The CHAIRMAN. And with regard to other issues that you may take exception to in terms of the Supreme Court rulings, but nonetheless rulings that are clear, rulings on some of the more controversial social issues, notwithstanding the fact you may or may not agree with the ruling, you would feel as a matter of your oath of office you would be required to apply the law as it has been interpreted by the Supreme Court?

Mr. CONBOY. Yes, sir.

The CHAIRMAN. The last question I have—and obviously that is important.

Mr. CONBOY. Of course.

The CHAIRMAN. And I want to make the distinction for the record here. People ask why we spend so much time asking Supreme Court nominees about their philosophy and so little time asking questions of lower court nominees other than the one I just asked you, and it is real simple.

If you are honest and you are committed to your oath, you have no choice but to apply the law as is. If you are a Supreme Court Justice, you can change the law. We both understand that, and it is always good to have it on the record.

Now, there is one witness who is going to testify against your nomination.

Mr. CONBOY. Yes, sir.

The CHAIRMAN. And I will not presume to suggest what that testimony will be, but rather than have you up and back, it does relate, as I am told, to the whistle-blower statute in the City of New York.

Mr. CONBOY. Yes, sir.

The CHAIRMAN. It is my understanding that the city has a whistle-blower statute that is intended to protect those individuals, particularly city employees, who report activities or practices which they believe to be either corrupt or have the potential for corruption. Is that correct?

Mr. CONBOY. Yes, it is, sir.

The CHAIRMAN. Now, how many cases involving violations of this statute have come to the Department of Investigations during your tenure as commissioner?

Mr. CONBOY. Well, there have been a number of allegations; actual investigated matters, I think in the neighborhood of several dozen.

The CHAIRMAN. From your experience, how do you weed out complaints or allegations that are really based on spite, revenge or paranoia on the part of individuals reporting the violations and those which have substance?

Mr. CONBOY. Well, Senator, we follow very careful due process procedures. In the case at hand, there was a complaint that was made by a subordinate——

The CHAIRMAN. Now, what case at hand are you referring to?

Mr. CONBOY. The matter involving Mr. Carfora.

There was a complaint made by a subordinate in connection with the construction of the city's third water tunnel, which is at the present time at the range of $775 million in cost. It has been underway for 13 or 14 years.

In the contractual relationships of the various bidders, there were, in fact, three or four of the major contractors who had been convicted or had pleaded nolo contendere to bid-rigging.

It is uncontroverted that the manner in which those contracts were issued and supervised violated the controller's rules and regulations, and it is further uncontroverted that the subordinate, who was an honest public servant seeking to go first to his superiors to raise questions about the integrity of this process—that he was subjected to a pattern of abuse and retaliation that is clearly prohibited by Local Law 10.

Now, the City Council of New York City passed that law in 1983 principally to deal with the issue of how one prevents this kind of wholly unacceptable behavior on the part of senior commissioners.

In this matter, a deputy commissioner of the Department of Environmental Protection succeeded in demoting this individual and causing him to lose substantial salary. He tried to have him fired and the commissioner in the agency refused to do that.

Subsequently, we had proceedings and hearings. We invited Mr. Carfora's lawyer to read our report before we released it. We called new witnesses and additional witnesses that Mr. Carfora suggested. We reexamined them under oath and we ultimately concluded that there had, in fact, been a violation.

There is a statutory duty, Senator, upon me to carry out an investigation under that statute, and it was done. Due process of law here was done with respect to Mr. Carfora and with respect to the whistle-blower. The whistle-blower was reinstated.

Mr. Carfora was offered a hearing at the Department of Environmental Protection to challenge our findings, even though he had already had a plenary hearing with us. He declined to have it.

The mayor personally reviewed this matter, as did the corporation counsel. They concluded that the penalty meted out by Mr. Carfora's superior was in all respects appropriate. Mr. Carfora has since left the city government. He has filed a civil lawsuit in Federal district court. I am not a party to that lawsuit, nor is the Department of Investigation.

The matter is pending before Judge Pierre Laval, and I understand the matter is now at the status of a consideration of summary judgment dismissal.

So in summary, due process—that is the key issue here. There are obviously reasonable differences of opinion about which witnesses are to be believed, but there was a sensitive and, in my judgment, wholly exhaustive effort to give Mr. Carfora every opportunity to explain his actions, to appear, to have our report changed, to produce witnesses on his own behalf.

These were proceedings under oath; they were regular, formal proceedings under New York City administrative law. As I have said, the regular process in his own agency was available to him to further challenge those proceedings and he did not.

The CHAIRMAN. Thank you very much. I have no further questions.

Do you have any questions?

Senator THURMOND. Mr. Chairman, I just have a question.

I like to think about a judge who will restrict his actions to the judicial branch of the government. The Congress is elected by the

people to make the law, make the policy. The President is elected by the people to execute that policy. The judicial branch is appointed to interpret the law.

I have seen a number of Federal judges who have gone, I thought, too far in taking over school districts, hospitals, prisons, and other State bodies, State institutions. In my opinion, they are getting beyond their realm of jurisdiction and they generally end up in trouble or causing embarrassment to the local people.

The local people, I think, ought to run their own institutions, and I just wanted to pass that along to you because I think judicial activism can be very not only repulsive, but it can be very strife-bringing in a lot of ways.

And I just hope that when you become a judge, and I do not think you will have any trouble being confirmed, that you will restrict your activities to the judicial branch.

Mr. CONBOY. Thank you, sir.

The CHAIRMAN. Mr. Conboy, I have no further questions of you or your brother.

Mr. CONBOY. Thank you very much.

The CHAIRMAN. Mr. Carfora, would you please come and be sworn? Would you raise your right hand? Do you swear the testimony you are about to give will be the whole truth and nothing but the truth, so help you God?

Mr. CARFORA. I do.

The CHAIRMAN. Please be seated, and if you can limit your statement to 5 minutes we would appreciate it.

TESTIMONY OF FRED CARFORA, FORMER DEPUTY COMMISSIONER, NEW YORK DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK, NY

Mr. CARFORA. I will try. However, I did not anticipate that I would have to answer all the questions that were raised. It was interesting listening to all of the eloquent——

Senator THURMOND. Would you speak into the microphone so we can hear you?

Mr. CARFORA. I said it was interesting listening to all the accolades, and I think that one of the things that came through to me quite clear was that Mr. Conboy's experience is of a prosecutor, and it would seem to me that his prosecutorial expertise is something that is evident in my relationship with him. Whether he has another dimension is for you people to determine.

I am here to tell you about how Mr. Conboy unjustly robbed me of my dignity, shamed me and my family, and caused me financial chaos. Whether I can do this, Senator Biden and Senator Thurmond, in 5 minutes, I do not know. I am not an attorney, I am not a member of the bar.

The CHAIRMAN. Take your time.

Mr. CARFORA. And I am not eloquent, and I am——

The CHAIRMAN. You are doing just fine.

Mr. CARFORA. I am obviously upset.

The CHAIRMAN. Take your time.

Mr. CARFORA. I would like to try to remember all of the points that Mr. Conboy inaccurately stated.

The CHAIRMAN. Well, why do you not tell us your side and then we will go?

Mr. CARFORA. Okay, okay. I am going to try to tell you my side as quickly as I can. First, let me say that I went to the FBI way back in the spring and I told them my story and they opened a civil rights and human rights action on the basis of what I told them.

Inadvertently, due to their workload, it would appear that while they opened the case and while I called them many times to find out the status of that, of the case, I got no response and it was just Sunday, this past Sunday, that I heard from an agent of the Civil Rights Unit of the FBI very apologetically saying to me that we are sorry, Mr. Carfora, we have on record that you have a civil rights complaint dating back to July of this year and no one has done anything about it, so we would like to start that investigation, and on Monday an FBI agent came to my home.

I would also say that Governor Cuomo's Committee on Governmental Integrity is another body that I have been talking to about this because while Mr. Conboy makes it quite clear the way things happened according to the Department of Investigation, I would like to refute all—many, if not all, of the statements that he said, he made.

I am sorry. As I said, I am not professional and I have just made penciled notes and so I am going to have to make reference to penciled notes as I go along.

The CHAIRMAN. Look, now, there is no big formality about this.

Mr. CARFORA. Okay.

The CHAIRMAN. Just take your time, be calm, and say what you have on your—picture yourself at your kitchen table telling us what happened.

Mr. CARFORA. Okay. The complaint, as Mr. Conboy said, was based on a whistle-blower, a fellow who worked for me, mind you, a level beneath me. There was two levels of management between me and this fellow.

The whistle-blower law promulgated in 1984 in the city of New York has some language to the effect of potential corruption. Well, first, I ask you what city, State or government employee cannot say there is potential corruption, there is potential corruption, and there is potential corruption? What does potential corruption mean? What is that vagary? What is that nebulous reference to, potential corruption? That is what this man had to say.

And there was two potential corruptions that he spoke about, one of which nobody ever remembers anymore because it was so ridiculous and nobody choose to. I do not remember it because I never paid attention to him because he had no credibility to me.

He took off—and everything I say, I can prove to you here—he took off 38 sick days in a 22-month period of time. I have time sheets here, okay. He falsified time sheets. We have records here of—I was only an assistant commissioner in 1984, not a deputy commissioner.

The deputy commissioner at the time, a fellow by the name of Ira Wechter, was not called by Mr. Conboy's Department of Investigations. He would have told them that he wanted to fire the gentleman long before I suggested or proposed that he be fired.

The gentleman writes me a memorandum in January of 1986 and says that there is potential corruption. I have memos in here, four memos from me to the commissioner, stating the same—making the same observation to the commissioner, bringing to his attention that this is administratively inappropriate. My memos are to Joe McGuff.

Frank McCardle, who is a former commissioner, knew that the contracts were processed that way, wanted them that way. My memos to Joe McGuff say they are administratively incorrect. Joe McGuff tells me we are going to leave them that way.

Jeff Somer, who was the first deputy commissioner, I had a hundred conversations with. He said we are going to leave them that way.

And Mr. Conboy's remark that the controller says they are illegal is a lie because Mr. McGuff went to the controller and said is it okay and the controller said to Mr. McGuff it is appropriate. That is what Mr. McGuff told me about the way the tunnel contracts were processed.

This man writes me a memo after I have written four memos to Commissioner McGuff saying that they are administratively inappropriate because—I do not mention in the memorandum that there is potential corruption because that, to me, is ludicrous. I have just told you why I thought it was ludicrous.

But this man mentions that there is potential corruption because there is a method in his madness, because his performance is questionable by Commissioner McGuff, which is documented in here. His performance is questioned by the Department of General Services, who did an audit and said that Procurement Division is in bad shape.

And Commissioner McGuff instructs his inspector general to come to administration to review the process, inferring that there may be something quite inappropriate about them. So the thought that there is something corrupt is not what I am thinking, but it is what this gentleman puts down that there is potential corruption.

Now, he tells me this in a memorandum in January of 1986—1984—I'm sorry, 1986. I got my——

The CHAIRMAN. Take your time. I have trouble remembering what today is.

Mr. CARFORA. 1984, 1984—no, I'm sorry, in 1984.

Now, in the spring of 1984 this fellow also starts a business, a travel agency business, which he devotes a lot of time, which I can give you witnesses that will testify to that; again, another reason for my questioning his performance.

I go back every morning and watch what time he comes in. Mind you, I am not his manager. There is a level of management between me and him, but I go back every morning to look and see what time he comes in. He is coming in at 9:30, 10:00, and after every morning, and signing his time sheets he is coming in at 9:00.

The CHAIRMAN. Let me ask you a question. If there was a level of management between you and this Mr. Nicastro—is that the name?

Mr. CARFORA. Yes.

The CHAIRMAN. If there is a level of management between you, why would you take the time to go check when he came in?

Mr. CARFORA. Because I felt that the manager, the one between, had too much responsibility to watch him on a daily basis. I took it upon myself. It is a management style. Maybe it is——

The CHAIRMAN. Did you do that for anybody else?

Mr. CARFORA. Did I do that for anybody else?

The CHAIRMAN. Yes.

Mr. CARFORA. From time to time, I have done that, yes.

The CHAIRMAN. Why did you not like Mr. Nicastro?

Mr. CARFORA. It was never personal; never personal, Senator. Senator, when Commissioner Wechter, the deputy commissioner, who was my boss as well as his boss, wanted to fire him, I was the one who interceded with Commissioner Wechter and said I will work with him; we will try to get him to be more cooperative and more responsive. So it was never a personal thing.

But, Senator, I ask you something. You touched upon a very good point. If I did not like Nicastro, if it was a personal thing, even if it was a personal thing, which many bosses have personal opinions of employees—some you like and some you do not like; some you like more and some you like less.

And if I want to take it out on somebody, why can I not take it out if that were the case? If that were the case, and it is not the case, but if that were the case, does that make me guilty of retaliating against a whistle-blower? But let me go further, let me go further.

The CHAIRMAN. Let me ask another question just so I understand. Did you make mention to Mr. Nicastro or anybody else of your problems with his work performance prior to Mr. Nicastro blowing the whistle under the statute?

Mr. CARFORA. In June of 1984, I called Mr. Nicastro into my office with a fellow by the name of John Dunn, who was his supervisor, and Lou Tassi, who was the personnel director—into my office, with the two of them present, because Mr. Nicastro was a very volatile person. That is why Mr. Dunn, his supervisor, was intimated to some extent because Mr. Nicastro was volatile. And I called him in in their presence and reprimanded him.

The CHAIRMAN. Now, was that before he——

Mr. CARFORA. Before.

The CHAIRMAN. Before. How long before, roughly?

Mr. CARFORA. This is approximately in June of 1984, okay?

The CHAIRMAN. Yes. When did he make his allegation under the statute?

Mr. CARFORA. Now, wait now. Now, let me tell you the story. That is in June of 1984. He wrote me the memo in January, I think, of 1986, okay? Now, the summer of 1984, he was out, well, I cannot tell you how many days, which I had up to here.

He came up to John Dunn, his supervisor, and said I want to go to Florida because I have not been feeling well, and I told John Dunn no good. He went to Commissioner McGuff and said I want to go to Florida. Commissioner McGuff called me on the phone and said, look, he said he is not feeling well; he wants to take a vacation, which I resented. Yes, I resented that.

He went over my head to the Commissioner. The Commissioner allows him to take a vacation. While the Commissioner is criticiz-

ing his performance and our performance, he allows him to take a vacation.

The CHAIRMAN. Had he blown the whistle?

Mr. CARFORA. Wait, let me tell you, let me tell you.

The CHAIRMAN. Just answer that question.

Mr. CARFORA. No, he does not blow the whistle until, I think, September of 1986.

The CHAIRMAN. Okay.

Mr. CARFORA. 1984; I am sorry.

The CHAIRMAN. 1984.

Mr. CARFORA. When he comes back, I call him in—oh, I am sorry. I do not remember exactly when he went to the IG. He might have gone—oh, yes, I found out from the Department of Investigations he went to the IG in June, unbeknownst to me; I do not know that. He went to our IG in June of 1984. I found out from——

The CHAIRMAN. And you spoke to him in June of 1984, also?

Mr. CARFORA. Yes.

The CHAIRMAN. Now, let me ask you one other question.

Mr. CARFORA. I think that is approximate dates; I do not know.

The CHAIRMAN. Okay. Why did you not show up or choose to go before Mr. Conboy's commission when they gave you an opportunity, apparently, after the report was written?

Mr. CARFORA. Senator Biden, I told you there are many things that Mr. Conboy said that I would refute. I would like to get to that.

The CHAIRMAN. No, no; get to it now.

Mr. CARFORA. Get to that now?

The CHAIRMAN. Yes, get to that now.

Mr. CARFORA. Mr. Conboy said why did I not have——

The CHAIRMAN. No; I said.

Mr. CARFORA. What did you say again? Repeat that. Why did I not go for my hearing?

The CHAIRMAN. Yes.

Mr. CARFORA. I was never offered the hearing.

The CHAIRMAN. You were never offered a hearing?

Mr. CARFORA. Never offered the hearing, sir.

The CHAIRMAN. Were you offered an opportunity at any time to come and tell your side of this story?

Mr. CARFORA. The Department of Investigations conducted an investigation, but mind you, that was the second investigation. The Department of Investigations in 1984 under Commissioner McGinley conducted an investigation, Senator. Commissioner McGinley conducted an investigation when Nicastro lodged his first complaint.

Commissioner McGinley and the inspector general of our department, a fellow by the name of Jim Hopkins, both investigated and found no validity to it and threw him out, okay? He resurrected the charge in the paranoia of 1986, okay?

The CHAIRMAN. Yes.

Mr. CARFORA. Mr. Conboy comes in as the new Department of Investigations chief in 1986.

The CHAIRMAN. Yes.

Mr. CARFORA. And I am the first case he gets and I am the first example he is going to make, and so he conducts an investigation and they call me down. And I do not know, I do not realize—I am too stupid to realize that I am the target of the investigation, so I go without an attorney and they conduct an investigation at the Department of Investigations.

Subsequently, I do not call any witnesses. I am not asked if I want to call witnesses. They call all the witnesses they want to call. Frank McCardle, the former commissioner——

The CHAIRMAN. You do not need to get into the names; I would not know them anyway.

Mr. CARFORA. Okay, okay. I do not call any witnesses.

The CHAIRMAN. Right.

Mr. CARFORA. He has findings, okay?

The CHAIRMAN. Yes. At that point, after he has findings, you come down without a lawyer, you come down without knowing you could call witnesses; you testify or you speak with Mr. Conboy's commission. They have others come in and take a different point of view. Mr. Conboy's department now writes a report.

Mr. CARFORA. Yes, sir.

The CHAIRMAN. At that point, did they tell you you could come in again, refute the report, give you an opportunity to do anything?

Mr. CARFORA. They gave me an opportunity to respond to the report.

The CHAIRMAN. Right.

Mr. CARFORA. At that point I hired an attorney and we responded to the report.

The CHAIRMAN. You did respond to the report?

Mr. CARFORA. Yes, sir; yes, sir.

The CHAIRMAN. Okay.

Mr. CARFORA. We responded to the report, and everyone in city government, everyone in the department—Commissioner Schultz, who is now the commissioner; Richard Bowers, who is the counsel—all of the people in the department who know me, who know what kind of a person and what kind of a worker I am, said, well, gee, you now—you have proven your innocence with my response to the Department of Investigations.

My response to the Department of Investigations goes down. They subsequently write another report and the other report, Senator, says—the other report says not only do I continue to be guilty, but I am now guilty of not submitting a report, an evaluation report submitted by Nicastro's new boss, okay, to the commissioner, because the new commissioner asked his new boss for an evaluation, a man by the name of Frank Minori.

But Frank Minori, who works for me at this time, gives me the report, okay, and I said to Frank, what is this report? He says Commissioner Schultz asked for this. I gave it to my secretary. My secretary—the report says that I somehow did something with that report.

My secretary took the report, sent it to Commissioner Schultz' office. I have a signed courier receipt in here, a signed message by my secretary, a young lady by the name of Evelyn Torres, to Commissioner Schultz' office signed by his secretary, sent by a courier that he got that evaluation, and what is written on it is evaluation.

And I did not send it and I am not alleging I sent it. My secretary sent it. She will swear to that, she will testify to that, and it is in her handwriting. But in the report I was said to have somehow taken that report and done something evil with that report.

The CHAIRMAN. Let me ask you another question. Why do you think—and this is my last question—why do you think Mr.——

Mr. CARFORA. Your last question, sir?

The CHAIRMAN. Yes.

Mr. CARFORA. I would like to have been able to tell you quite a bit more.

The CHAIRMAN. Well, we really get the gist of what you are saying and I would like to get right to the nub of it. What is it that you think Mr.—why do you think Mr. Conboy did this to you, as you allege? What was his motivation? Why would he go after you instead of Nicastro?

Mr. CARFORA. There are so many things that I could tell you that I could here and now prove to you how terrible and how wrong. It would indicate to you that something was radically wrong with the whole thing, like my being charged with retaliating against Nicastro, which meant taking $1,000 away from him, which was evidence, according to Mr. Conboy, of retaliation.

I did not take the $1,000 away from him. I was ordered to by city hall, okay? I have proof of that here, because I signed his salary at 36,000, city hall sends it back at 35,000. They did it; they forced me to do that.

Nicastro came to me in December of 1985 and said to me, gee, Fred, you are taking $1,000 away from me, and I said I am not taking it away; you know, city hall is forcing me to take it away.

But I would tell Terry Kinch, who was our payroll clerk, to take it out in as little increments as possible over the course, which—the only reason I tell you that is because Nicastro did not believe I was retaliating against him, because why would he come to me and talk to me like that and why would I——

The CHAIRMAN. It is one thing——

Mr. CARFORA. And your question is why did you——

The CHAIRMAN. Is Mr. Conboy just incompetent as far as you are concerned? Was he malicious? Were you a target, or did he just make a mistake? I mean, there are all different reasons. If he was malicious——

Mr. CARFORA. Listen, you know, I am not an attorney.

The CHAIRMAN. No, I am not asking for an attorney's——

Mr. CARFORA. And maybe it is best if you draw your own conclusions. I am trying to present to you a scenario and you can characterize it the way you see fit, whether it is incompetence. I can give you enough here to show you that my life was destroyed.

I was 2 years short of a pension after 28 years of civil service.

The CHAIRMAN. Did you get fired?

Mr. CARFORA. No. I resigned, but I have had cancer, lymphoma, which is this and three operations. I have had chemotherapy for a year. I have had chemotherapy for 6 months, and they knew this, and my doctor, which is an oncologist, said to me do they know what they are doing to you? Excuse me.

The CHAIRMAN. Take your time. Would you like to take a break?

Mr. CARFORA. No, sir, no, no, no. I was saying I would show you—I would like to document this for you and you characterize it, whether it is incompetence or whether there was another agenda. My agenda to you is that there was paranoia in New York.

There was Stanley Friedman and there was Donald Manes and there was all the corruption, and Fred Carfora was there and he was handy, he was handy; he could go. Do you understand?

An accusation was made that I was a tool. If I did not have a motive, if I was not trying to protect water tunnel contracts, what did I punish Nicastro for and how did I punish him? Nothing makes sense, Senator; nothing makes sense.

That is why I ask you, please wait until the FBI does their investigation. That is all I ask you to do. I am not telling you—I have no personal animosity toward anybody. I want my—I had 28 years of working for government. Where do I go at 58 years old and start a new life?

Being deprived of my pension, having had cancer three times, is that compassion? Is that what you look for? Are those the qualities you look for? Is that what this group wants? I ask you that, and I ask you just wait until the FBI does their investigation. That is all.

You ask them to expedite it in a week, or give them a deadline, 10 days. I want my name cleared. I do not even want money, but what they did to me—Senator, you yourself experienced some of this. These are newspapers programmed to destroy me. For what? What did I do, sir? What did I do? What did I do?

I took a malingerer, a man I thought was a malingerer who took 38 sick days off in 22 months, and all the other things, and I in good faith as a manager—and there is nobody will tell you in government that I acted any other way. I tried to do what was responsible and they killed me for it; they killed me. It would have been kinder if they shot me in the head.

Now, I just want to show you two things. There is an article here in the New York Post. You asked Mr. Conboy how many cases of whistle-blower there were in the city of New York. Well, the article here in the New York Post on September—now, I got them all screwed up—in September there was 31 whistle-blower—since Mr. Conboy is the commissioner, there were 31 whistle-blowers in New York, and the article points out the only one that was prosecuted was me. That is the article in the New York Post and I will find that for you.

I have another article in here.

The CHAIRMAN. I have it right here.

Mr. CARFORA. You have the article by Murray Kempton?

The CHAIRMAN. No. The one I have is by David Shifrin.

Mr. CARFORA. Okay, you have that one. Do you have the other one by Murray Kempton?

The CHAIRMAN. I do not have Murray Kempton's article.

Mr. CARFORA. The article on 31 whistle-blowers is in September. Murray Kempton on December 6th, a well respected columnist, editorialist, in the Newsday paper, wrote a public apology to me because he said that what he based his—he wrote a terrible, scathing column on me when this was all going on and he said he did it on the basis of what he was told by the Department of Investigations.

And he wrote an article on December 7th which was a public apology to me.

The CHAIRMAN. I have it here and we will enter it in the record.

[Article follows:]

HOW TO TELL A JOURNALIST FROM A HITMAN

(By Murray Kempton)

Very few of our sins have the grace and courtesy to forbear bobbing up and haunting us long after they had slipped our minds, and sure enough, one of my sins dropped by Friday.

There is no commanding reason to identify him by name and there is a compelling one not to, because to do so would be to revive a small scandal that had faded away in a week.

It is enough to say that he had been an executive in a city agency and accused of trying to fire a subordinate who was on the trail of potential corruption in contract awards. The charges could not be proved, and he was allowed to resign with a half portion of his pension and a full ration of disgrace.

Eighteen months have gone by and those of us who took his guilt for granted ought to have begun to wonder why, in all this time since the corrupt were stripped of the shield of this presumed protector, no instance of corruption in this agency's contracts has been revealed or, for that matter, even alleged. But I didn't wonder, because I had so entirely forgotten the affair that, when this ghost of my transgressions past manifested himself with the gentlest reproaches, I did not so much as remember his name and had to look up what I had written about him to find who he was.

There are few discomforts more acute than to pick up some unrecalled composition of one's own and discover how remote from the actualities it was. I had painted this poor fellow's portrait from a report of the city Department of Investigation and heightened its sober and tentative grays with splashes of the high color of vocational custom.

Its subject had been for me a form without flesh, blood or any reality except a name encumbered by an insufficiently tangible finding of official displeasure, and I had been content to fall upon the wounded and go home to sleep the sleep of the unjust, which I long ago decided is as untroubled as the sleep of the just can ever be.

Yesterday morning the real man appeared, and we talked about his cancer and its remission, and I was assailed by the recognition that I could never have written so scornfully about a fellow creature with whom I had the slightest acquaintance.

And then, of a sudden, I felt that I at last understood that the difference between journalists and the Mafia is that Mafiosi leave strangers alone and shoot to kill only those they know, while journalists leave those they know alone and shoot to kill only strangers.

That judgment sweeps, of course, altogether too wide; but then all of us have the stubborn habit of forgiving our own sins by trying to imagine them as universal practices.

Still, in my case as in several others, it would seem a minimal requirement that, however often we may despair of ever understanding enough of what we write about, we anyway try to know who we are writing about.

On Wednesday, Alexander Haig was the breakfast guest of the Association for a Better New York. He is, as is dimly known, one of 12 declared—or is it 13?—candidates for president of the United States, who make up a lot with an impact so meagerly charismatic as to excuse the surmise that the long, if recently troubled, slumber of the Reagan years has brought us at last to the numbing of America.

Haig has his message, I suppose, but very little about it has much detectable throb except in the undertones of a distaste for the president and all about him that seems personal to a degree unique among Americans. The only perceptible flame left in Alexander Haig is his resentment of felt ill-usage from his inferiors when he was secretary of state.

I have not seen a candidate who reminded me as much of Sir Forcible Feeble on first impression since former Gov. John Connally of Texas ran for the Republican nomination in 1980. But I had no sooner made the comparison than I remembered how much I had grown to like John Connally.

We traveled three days across South Carolina with Stom Thurmond creakily bearing the torch in our vanguard, and Connally and I, having met as stiffly as hostile ambassadors, became so mated in soul that he asked why I wasn't voting for him.

I replied that he had been a director of the National Youth Administration when I was collecting its dole, that he was a commander in the Navy when I was a corporal on company punishment and that the IRSA had grabbed my bank account on the very day he was appointed secretary of the Treasury. There was, I said, an unbridgeable chasm of class between us.

He graciously conceded my point, as any proud man will when it is conveyed as an affirmation of his social superiority. Our leave-taking was heartful and, when I heard that he, having grown rich with Texas, was close to going bust with it, I gave way to the prayerful hope that, booted and spurred, he would climb back upon the backs of the poor once again.

It is just that generally impossible to look upon a man with entire disapproval once you've made the effort to look at him at all.

The CHAIRMAN. Well, it seems to me you are making your case.

Mr. CARFORA. I have much more to make, Senator. I know you are running out of time, but I would like—that is why I asked you, let the investigation go forward. Let me be able to tell my story to somebody. This happened a year-and-a-half ago, sir. I have been out of work for a long time. I took a very menial job now and I just want to clear my name. That is all I want to do.

The CHAIRMAN. I understand that, and what I would like to ask you to do is make available what you have there to our investigative staff. We will not ask that it be reprinted in the record, but we will have it made available to the investigative staff and we will look at that.

And let me ask you one more question.

Mr. CARFORA. Yes, sir.

The CHAIRMAN. You have a civil suit that is underway now, is that not correct?

Mr. CARFORA. Yes, sir.

The CHAIRMAN. So you will have an opportunity, in addition to the possibility of an FBI report moving on, to make this available in the civil case, correct?

Mr. CARFORA. Well, sir, not to interrupt you, but you see, what I wanted—what I would have liked is both to go forward because I do not know how well I——

The CHAIRMAN. I am not suggesting the other will not go forward.

Mr. CARFORA. No. I do not know as far as the civil suit is concerned whether I have status or what the court will determine as far as having status, you know.

The CHAIRMAN. Standing, I understand.

I have no further questions, but I would ask my staff and the Judiciary Committee staff to meet with you and go over what you have there, in addition.

Do you have any questions, Senator Thurmond?

Senator THURMOND. Mr. Chairman, I think you have covered it.

The CHAIRMAN. I appreciate your taking the time. I understand, and it is obvious from the earnestness with which you plead your case that there is a great deal at stake for you in terms of your personal reputation.

Any of us who have served in public office or served the government has some knowledge of the vagaries of public opinion and the

press and our colleagues, and Judge Conboy, if he is a judge, will find that out himself, and has in his public career.

But I have no further questions for you at this time, but I will ask my staff to ask you additional questions.

Mr. CARFORA. Senator, can I just add one more thing? I wanted to say to you that I heard you say to one of the other people testifying that you are not necessarily bound by legal protocol and that you sort of admit hearsay.

And I want to tell you that I can tell you that Corporation Counsel Schwartz, who was the corporation counsel at the time of the decision to demote me and take away $11,000 from my salary, which was what I was told was the decision—I did not have an option of having a hearing. I was told that I was getting $11,000 and being demoted back to an assistant commissioner and they would find me a job, and at that point I had had enough.

But I was told that corporation counsel said my civil rights were violated. That is what I was told.

The CHAIRMAN. We will find that out. Thank you very much.

Mr. CARFORA. Thank you, sir.

The CHAIRMAN. Mr. Conboy, is there anything you would like to respond to? And I want this brief because we are going to end this hearing in 5 minutes.

Mr. CONBOY. Senator, I would like to——

The CHAIRMAN. Is there anything you have learned today based on the statements made that would make you reconsider your judgment in any way or any aspect of it?

Mr. CONBOY. Senator, I would like to refer the committee to the operative document in the matter, which I believe the staff has. It is a letter dated July 2, 1986, from me to the superior of the witness. The individual is the Hon. Harvey Schultz, the Commissioner of the Department of Environmental Protection. This sets out in detail the factual findings of the proceedings.

[Letter follows:]

The City of New York

Department of Investigation
130 JOHN STREET • NEW YORK, N.Y. 10038
TELEPHONE 212-825-5900

KENNETH CONBOY
COMMISSIONER

July 2, 1986

Honorable Harvey Schultz
Commissioner
Department of Environmental Protection
2356 Municipal Building
New York, N.Y. 10007

Dear Commissioner Schultz:

This Department has concluded its investigation into whether Fred Carfora, Deputy Commissioner of the Department of Environmental Protection, violated Local Law 10 and Executive Order No. 78 by taking retaliatory action against a subordinate, Edward Nicastro, in connection with Mr. Nicastro's determination to report to appropriate authorities contract irregularities associated with the construction of Water Tunnel Number Three.

The City's commitment to investigate aggressively and deter corruption and fraud affecting the government depends upon maintaining a climate in which employees can come forward with information freely and without fear of retaliation. Those in government who retaliate against employees who have stated they will report, or who have reported, corruption or fraud, or hazards that give rise to such conditions, by taking adverse personnel actions against such employees, undermine efforts to root out corruption and fraud. They instill fear in honest and conscientious public employees that their efforts to expose areas warranting investigation will undermine them in their jobs and ultimately be to their own detriment. Such pernicious practices deny the City's investigative agencies needed information, assistance, and evidence. Furthermore, such irresponsible officials instill in New Yorkers broadly a cynicism about the will and, indeed, the ability of the City government to correct the abuses that have been disclosed during the present crisis in confidence in municipal affairs.

We have concluded, after an extensive and detailed investigation, that Commissioner Carfora violated Local Law 10 and Executive Order No. 78 in taking retaliatory personnel actions against Edward Nicastro.

This Department has reviewed your letter of May 8, 1986, and carefully examined Commissioner Carfora's response to our April 23, 1986 report. We have re-interviewed James Hopkins and Louis Tazzi; have taken sworn testimony from Frank Munari, Steven Ostrega and John Boden; have taken additional sworn testimony from John Dunne and Fred Carfora. This transmittal, in conjunction with my letter to you of April 23, 1986, constitutes the final report of this Department on this matter.

The Department of Investigation has made the following findings of fact after an extensive investigation. Edward Nicastro received a performance evaluation for Fiscal Year 1981 of "OUTSTANDING," for Fiscal Year 1982, "OUTSTANDING," and for Fiscal Year 1983 "VERY GOOD." Commissioner Carfora endorsed and personally signed the latter two evaluations. During most of calendar year 1983, Mr. Nicastro was the Director of the Procurement/Contracts Unit under Deputy Commissioner Ira Wechter and Fred Carfora, then an Assistant Commissioner of DEP. During that period, Mr. Nicastro had, on numerous occasions, verbally advised Commissioner Carfora of his concerns about possible corruption hazards associated with contract procedures relating to the construction of the Third Water Tunnel. In substance, he asserted that these procedures, which did not provide for an independent audit role in bidding and vouchering, constituted a violation of certain Comptroller's Directives.

On December 2, 1983, Commissioner Carfora wrote a memorandum to all bureau chiefs and administrative liaison officers of DEP and set forth a proposed revised contract procedure. This memorandum made no reference to corruption hazards associated with then-in-place contract procedures relating to the Third Water Tunnel project. On January 3, 1984, Mr. Nicastro sent Commissioner Carfora a memorandum in which he represented his verbal concerns previously expressed and specifically stated that if the status quo continued, "I would have no choice but to report this to the Department of Investigations." He further stated that, "considering the past history of the Bureau of Water Supply and the problems we have had with their Imprest and Confirmatory orders, I would be most fearful to (sic) what is going on with the tunnel job." Most significantly, he then went on to recommend "an independent audit be made of all of the jobs that have been issued by Water Supply." Approximately two weeks later, on January 19, 1984, Assistant Commissioner Carfora wrote to the Honorable Joseph T. McGough, Jr., DEP's Commissioner. In this document, Commissioner Carfora urges upon Commissioner McGough the need for revised contract procedures and particularly, the need to be in legal compliance with the Comptroller's Directives. He is silent, however, on Edward Nicastro's recommendation that an independent audit be made of the various jobs that had been issued by the Bureau of Water Supply while procedures that constituted violation of the Comptroller's Directives were in force.

In June of 1984, with no such investigation forthcoming, Mr. Nicastro brought his concerns directly to DEP's Office of the Inspector General, and advised Deputy Inspector General John Stagnari of the matter. In September, Mr. Nicastro raised his concerns with the Inspector General, James Hopkins.

On or about October 10, 1984, Commissioner Carfora asked Mr. Nicastro's immediate supervisor John Dunne, to prepare an evaluation of Mr. Nicastro for Fiscal Year 1984. Commissioner Carfora told Mr. Dunne that he needed the evaluation in connection with his stated intention of requesting Commissioner McGough to terminate Mr. Nicastro. Mr. Dunne prepared the Fiscal Year 1984 evaluation and gave Mr. Nicastro an overall rating of "GOOD." Commissioner Carfora quarreled with that evaluation and insisted that Mr. Dunne add a footnote to the evaluation concerning Mr. Nicastro's performance during the period after June 30, 1984, the end of Fiscal Year 1984. On October 10, 1984, Commissioner Carfora prepared a form requesting Mr. Nicastro's termination.

On October 12, 1984, Commissioner Carfora talked to Mr. Hopkins about his intention to seek Mr. Nicastro's termination and Mr. Hopkins told Commissioner Carfora that Mr. Nicastro had made a complaint to the Inspector General's Office about his concerns relating to the Third Water Tunnel and that Mr. Nicastro was a "whistleblower."

Thereafter, on October 16 or 17, 1984, Commissioner Carfora submitted to Commissioner McGough a recommendation that Mr. Nicastro be terminated and gave Commissioner McGough the Fiscal Year 1984 evaluation prepared by Mr. Dunne reflecting an overall evaluation of "GOOD." The evaluation submitted by Commissioner Carfora to Commissioner McGough did not contain any changes made by Commissioner Carfora in the Fiscal Year 1984 evaluation.

Shortly thereafter, Commissioner McGough rejected Commissioner Carfora's recommendation and decided not to terminate Mr. Nicastro, but to transfer him to a position outside of Commissioner Carfora's supervision. Though Mr. Nicastro was placed in a non-managerial position, Commissioner McGough authorized that he continue at the same rate of compensation.

Only after Commissioner McGough's rejection of Commissioner Carfora's request that Mr. Nicastro be terminated did Commissioner Carfora check the box designated "MARGINAL" on a copy of Nicastro's Fiscal Year 1984 evaluation and sign his name.

With respect to Mr. Nicastro's marginal rating, Commissioner Carfora concedes that he violated City personnel procedures by concealing his action from Mr. Nicastro and thereby depriving Mr. Nicastro of his legal right to appeal the rating.

In October of 1985, the personnel form with the changed rating was used to prepare an agency-wide plan for managerial raises. As a consequence, Mr. Nicastro did not receive a 5% compensation increase as of July 1, 1984 pursuant to Personnel Order 85/13. Furthermore, Mr. Nicastro was, at that time, demoted to a sub-managerial position based upon the 1984 transfer and suffered a $1,000 reduction in pay, retroactive to August 1985.

Based upon the aforesaid factual findings, it is incontrovertible that an employee of the City government, Edward Nicastro, expressed specific concerns about the integrity of Third Water Tunnel procedures to a senior supervisory official, Commissioner Fred Carfora. It is acknowledged that after having gone to the agency Inspector General's Office with his complaints, that Mr. Nicastro became the subject of a determined termination effort by Commissioner Carfora and that his most recent performance evaluation then on file at DEP was changed from "GOOD" to "MARGINAL." It is further clear that after the agency head refused to terminate Mr. Nicastro or reduce his compensation, that Commissioner Carfora played a principal role in using the changed 1984 performance evaluation to cause an official demotion and reduction in salary for Mr. Nicastro in October of 1985.

No investigation into possible corruption of Third Water Tunnel contract procedures was initiated by Commissioner Carfora or other officials at DEP. In early 1986, such an investigation was launched spontaneously and independently by the District Attorney of New York County. That investigation is ongoing at the present time.

In his sworn testimony given at this Department, Commissioner Carfora did not reject the possibility of corruption in the Third Water Tunnel contracting procedures. However, he stated emphatically that he rejected any assertion of corruption coming from Mr. Nicastro. This is a curious position to take since he never requested that an investigation be undertaken in spite of the fact that his subordinate had responsibly concluded that contract procedures were not in compliance with corruption control directives promulgated by the Comptroller. The only inference that one can draw from this testimony by Commissioner Carfora is that he concluded, without any objective basis, that any suggestion of corruption made by a subordinate was ipso facto a reflection on him and would not be tolerated.

Commissioner Carfora insists that his memoranda of December 2, 1983 and January 19, 1984, reflected a consistency with Mr. Nicastro's January 3, 1984 memorandum and, hence, any retaliation for corruption complaints would be illogical. Such an assertion ignores the crucial difference between the Nicastro and Carfora positions on the matter. Commissioner Carfora recommended only revising procedures for the future that were incontrovertibly in violation of the Comptroller's Directive. Mr. Nicastro wanted a retroactive investigation of actions already taken in the contracting process. Commissioner Carfora wanted no public airing of the matter, least of all a full-scale investigation by the Inspector General, the Department of Investigation, or the District Attorney.

Commissioner Carfora must concede, and he does, that he sought to take adverse personnel action against Mr. Nicastro after Mr. Nicastro went to the Inspector General's Office with his complaint and subsequently after Commissioner McGough refused to terminate Mr. Nicastro. He emphatically denies that these actions were taken in retaliation for Mr. Nicastro's having gone to the Inspector General or his threat to go to the Department of Investigation. He asserts that Mr. Nicastro's "performance was unsatisfactory. He was unreliable and undependable; his relationship with DGS was counterproductive; he could not train or develop his staff ... " Commissioner McGough testified, however, that Commissioner Carfora's criticisms of Nicastro were "sudden," and started during the summer of 1984 or shortly before. He stated that while there had been some criticism of Mr. Nicastro's performance by the Executive Staff, especially following a 1983 DGS audit, there had been no discussion of taking any adverse action against, or terminating Mr. Nicastro, until Commissioner Carfora recommended doing so in October, 1984. Commissioner McGough also testified that he, along with former Deputy Commissioner Ira Wechter and then-Assistant Commissioner Carfora, recognized that many of Mr. Nicastro's problems were attributable to the poor staff he inherited rather than to his own shortcomings. Furthermore, Mr. Dunne testified that he flatly disagreed with Commissioner Carfora's attempts to bring about Mr. Nicastro's termination.

Commissioner Carfora insisted, in his written and oral presentations to this Department, that his adverse actions against Mr. Nicastro were based upon his abuse of sick leave. He also asserted that he had personally checked Mr. Nicastro's work hours during one three week period in the summer of 1984. Commissioner Carfora alleged that Mr. Nicastro submitted time sheets falsely representing that he was working a full day when, in fact, he was not. Commissioner Carfora also gave this Department a memorandum prepared by Ms. Robin Silverman, the analyst in charge of the DEP Personnel Office's Time and Leave Unit, sent to John Dunne. Commissioner Carfora insisted that this memorandum, "demonstrates one instance of fraudulent submission of time sheets," by Mr.Nicastro.

Interestingly, John Dunne, Mr. Nicastro's immediate supervisor, testified that he didn't find Mr. Nicastro's use of sick time to be abusive. Even Commissioner Carfora testified that he had no reason to question the authenticity of medical notes submitted by Mr. Nicastro. Furthermore, Commissioner Carfora testified that he never reported Mr. Nicastro's alleged sick leave abuse to DEP's Office of Personnel, that Mr. Nicastro never received written notice that there was a problem with his use of sick leave and that, to his knowledge, Mr. Nicastro had never been placed on "sick leave restriction" by DEP's Office of Personnel, although such action would have been taken had Mr. Nicastro's absences exceeded permissable limits under City rules and regulations. Although Commissioner Carfora testified that Mr. Nicastro's alleged sick leave abuse was an ongoing problem, no such problem is indicated on any of Mr. Nicastro's performance evaluation forms prior to Fiscal Year 1984. Commissioner Carfora had no explanation for his failure to note this problem on the "OUTSTANDING" or "VERY GOOD" evaluations that he signed. Rather, Commissioner Carfora testified that he did not personally begin to scrutinize Mr. Nicastro's attendance until early 1984, right after Mr. Nicastro had complained in writing to Commissioner Carfora about possible corruption relating to the Water Tunnel and threatened to take those complaints to this Department.

A subsequent comment placed on the Fiscal Year 1984 annual evaluation and marked with an asterisk by John Dunne, which makes mention of attendance problems, was placed there, Mr. Dunne testified, only at Commissioner Carfora's insistence. With respect to the aforementioned Silverman memorandum, which Commissioner Carfora characterized as, "establishing fraudulent submissions of time sheets" by Mr. Nicastro, a plain reading of the document justifies no such allegation. The memorandum neither states nor implies that there was a "fraudulent submission" by Mr. Nicastro, but merely mentions that two different time sheets were submitted by Mr. Nicastro for the week of August 31, 1984. Commissioner Carfora ignores non-criminal explanations for this occurrence, such as Mr. Nicastro's forgetting that he had already submitted a time sheet for that week, or realizing that he had made an error in the time sheet submitted. In any case, his immediate supervisor, Mr. Dunne, discussed the matter at the time with Mr. Nicastro, and evidently took no personnel action.

Commissioner Carfora seeks to rely upon some memoranda prepared by Deputy Commissioner Wechter, critical of the performance of Mr. Nicastro's unit in October 1983 and January, 1984. These memoranda do not contain any suggestion that Mr. Nicastro should be disciplined in any way. Commissioner McGough made it quite clear in his testimony that although there were some instances of criticism of Mr. Nicastro's performance, the problems were not severe and that termination of Mr. Nicastro was never considered until October 1984 when only Commissioner Carfora recommended it.

As in all fact finding proceedings, issues of credibility here play a decisive role. Commissioner Carfora's credibility has been undermined by the testimony of three individuals. Commissioner Carfora told us that it was Commissioner McGough's intention initially to terminate Mr. Nicastro. Commissioner McGough flatly denied this and said he had never given any thought or expressed any intention of doing such a thing.

Commissioner Carfora asserted that the change of Mr. Nicastro's performance evaluation from good to marginal had no effect upon the October 1985 personnel actions that resulted in Mr. Nicastro's demotion and reduction in compensation. However, Nelson Dworkin, Assistant City Personnel Director, testified that had Mr. Nicastro's evaluation for Fiscal Year 1984 contained only an overall rating of "good," Mr. Nicastro would have received a retroactive managerial pay increase for the period starting July 1, 1984. He also testified that the derogatory information included specifically at Commissioner Carfora's direction for the period after June 30, 1984 was improperly included.

Finally, the testimony of Frank Munari, Director of Motor Equipment for DEP and Mr. Nicastro's principal supervisor since approximately November 1984, is relevant on the issue of Commissioner Carfora's credibility. Frank Munari, testified that on January 29, 1986, he received a memorandum from you requesting all materials regarding Mr. Nicastro's performance since his transfer to Motor Equipment. Mr. Munari testified that while a formal evaluation had not yet been prepared for Mr. Nicastro, he had written a memorandum to Steven Ostrerga praising Mr. Nicastro's performance on May 14, 1985.

Mr. Munari testified that he mentioned your request for information about Mr. Nicastro to Commissioner Carfora, who had replaced Steven Ostrega as administrator for Motor Equipment. Commissioner Carfora told Mr. Munari that he had received the same request from you and instructed Mr. Munari to submit this information to him, and that he, Commissioner Carfora, would submit all the documents to you. Mr. Munari testified that he gave Commissioner Carfora a cover letter to you, a copy of the May 14, 1985 memorandum, and copies of all of Nicastro's previous performance evaluations.

In early May 1986, Mr. Munari stated that he was apprised by you that the materials about Mr. Nicastro had not been received. Mr. Munari stated that he told you that he had submitted the documents to Commissioner Carfora. Mr. Munari then spoke to Commissioner Carfora, who denied ever receiving the materials from Mr. Munari. Mr. Munari then confirmed with a supervisor, Michael Marino, that Mr. Marino had been with Mr. Munari when he gave the documents to Commissioner Carfora. Mr. Munari also checked his files and found a copy of the memorandum from you requesting the materials; on the top Mr. Munari had noted, "sent to Carfora." It seems clear that Commissioner Carfora refused to transmit positive information about Mr. Nicastro to you, and then attempted to convince Mr. Munari that he, Commissioner Carfora, had never received the information.

Mr. Munari further testified that since Commissioner Carfora and Assistant Commissioner Eugene Egan became responsible for administering the Division of Motor Equipment, both have made several inquiries about Mr. Nicastro's visits to various law enforcement agencies. Mr. Munari testified that, although there have been no problems with Mr. Nicastro's use of time or punctuality since he began working at Motor Equipment, Messrs. Carfora and Egan questioned whether Mr. Nicastro should be required to take leave or sick time for his visits to law enforcement agencies in the absence of verification from such agencies that he had been requested by them to speak to them.

Additionally, as late as June 16, 1986, while this Department was conducting its investigation, Commissioner Carfora suggested to Mr. Munari that those employees who had provided support for Mr. Nicastro's position in this matter would, "all be taken care of in due time." When Mr. Munari asked Commissioner Carfora what he was referring to, Commissioner Carfora said that Mr. Nicastro had friends in Mr. Munari's section, Motor Equipment, and that Mr. Nicastro had received an "OUTSTANDING" evaluation for his work in Motor Equipment. Commissioner Carfora clearly viewed that evaluation as undermining his assertions that his own adverse personnel actions against Mr. Nicastro were objectively based and the clear import of his conversation was to suggest that he, Commissioner Carfora, was in a position to adversely affect those DEP employees who undermined his claims regarding Mr. Nicastro.

Based upon the foregoing, this Department affirms its findings of April 23, 1986, that Commissioner Fred Carfora took adverse personnel actions against Edward Nicastro because of Mr. Nicastro's making reports to the Inspector General about possible corruption and mismanagement at DEP.

It is my expectation that this extensive review of our investigation will prove useful to you in determining what action should be taken regarding Deputy Commissioner Fred Carfora's actions and behavior in this matter.

If you have any questions or require further information, do not hesitate to contact me.

Yours truly,

KENNETH CONBOY

KC/sk

cc: Nicholas Scoppetta, Esq.
Mr. Edward Nicastro

Mr. CONBOY. One of the points that I should like to be clear about is that Mr. Carfora was represented by counsel, Nicholas Scoppetta, a distinguished lawyer in New York, and indeed a predecessor of mine as Commissioner of Investigation.

The discussion with respect to his rights to a hearing at the Department of Environmental Protection were reviewed extensively with Mr. Scoppetta, and Mr. Scoppetta acting on behalf of his client, presumably on the basis of advice that he was given by Mr. Carfora, declined to have the hearing.

Secondly, Frederick A.O. Schwartz, Jr. is one of the most distinguished lawyers who ever served New York City. He is known to this Senate. He was counsel to the Democratic majority in the CIA investigation. He served the Mayor of New York as corporation counsel for over 4 years.

The corporation counsel endorsed the penalty in this case. He was quoted extensively in the newspapers at the time. The corporation counsel is not an individual who would have allowed the penalty to stand if he believed Mr. Carfora's civil rights had been violated.

The CHAIRMAN. Well, is it not true in bureaucracies as big as these that the individual and the details of these kinds of cases are not reviewed?

Mr. CONBOY. Not in this case, Senator. This was a very widespread and notorious matter because it did involve this water tunnel, which has taken such an immense amount of time to complete, with so many cost overruns and with the disclosure that there had been bid-rigging in other cases with respect to contractors who were awarded a piece of this action, if you will, and whose——

The CHAIRMAN. Did Mr. Carfora misstate——

Mr. CARFORA. That is not true, sir.

The CHAIRMAN. Please, sir, if you want anything else in the record—in light of what you knew then and know now, was Mr. Carfora, in your judgment—did he make a mistake in judgment or was he attempting to sanction a whistle-blower because he was a whistle-blower?

Mr. CONBOY. Mr. Carfora—the documentary evidence is very clear. He went and changed a personnel evaluation, which caused a reduction in grade. This is uncontroverted. Now, Mr. Carfora will insist that he did this for other reasons. This is an issue of fact.

We have resolved the fact, I think, carefully and systematically against him. It was reviewed by his superior and it was reviewed by other senior officials in the city government.

I think that that is the key question here, due process of law. Did he receive it? I believe that he did. Did we carry out our duties under the whistle-blower statute? And by the way, this was the—he is quite right. I am the first commissioner who went to the aid of subordinates, and we have had many notorious cases in the city. We have had the worst corruption scandal in the city in 120 years.

And I think under the circumstances the duty on me was very, very clear. We gave him every opportunity to supplement the record.

The CHAIRMAN. Was there pressure on you, also?

Mr. CONBOY. No.

The CHAIRMAN. You did not feel any pressure in the midst of all that was going on in New York City that the first case you would take, that it not stick?

Mr. CONBOY. Senator, I have had many, many notorious cases. I prosecuted the Weathermen in the bombing of a bank in 196[illegible] It is the only case where the Weathermen were sent to jail on felony charges in this entire country.

The CHAIRMAN. That is my point.

Mr. CONBOY. I have had many, many cases that were significant where I declined to proceed because there was inadequate evidence. A State supreme court justice in New York County was indicted for bribery. I moved to dismiss the case because the warrants were general warrants.

We had an investigation with respect to large——

The CHAIRMAN. If I may just ask a question, you felt no pressure?

Mr. CONBOY. No, sir.

The CHAIRMAN. Were there any other cases that were taken up under the statute where, in fact, a subordinate's position was sustained against a superior?

Mr. CONBOY. No, sir.

The CHAIRMAN. This is the only one?

Mr. CONBOY. This is the only one.

The CHAIRMAN. The first one and only one?

Mr. CONBOY. That is right, and I might add, Senator, that the principal matters we were engaged in at that time involved the prosecution of Stanley Friedman, the Bronx Democratic leader who was convicted in Federal court.

The CHAIRMAN. I know, I know; it made every paper in America, front page.

Mr. CONBOY. And we played a critical role. This was not the principal case we were dealing with.

The CHAIRMAN. I understand that. I was just trying to get a sense of what the atmosphere was at the time.

Mr. CONBOY. Yes.

The CHAIRMAN. I am not doubting your integrity and I am not doubting your sincerity. This is not a court proceeding. You are going to be put on the bench; you are going to be put on the bench with my support and my vote.

But it seems to me that the poor son-of-a-gun is obviously overwrought about this, and possibly with some good reason. Bureaucracies churn along and churn up people. Sometimes we make mistakes. Sometimes even guys like you make mistakes.

Mr. CONBOY. I have made many.

The CHAIRMAN. Guys like me make mistakes.

Mr. CONBOY. I have made many, Senator.

The CHAIRMAN. And I just wonder whether there is anything that you heard here that would in any way mitigate—not necessarily change your view, but mitigate the judgment made in the first instance.

Mr. CONBOY. Senator, no one could sit here and hear the anguish that was expressed by Mr. Carfora or appreciate the physical ordeal he has had on a strictly collateral basis and not be moved. I

am moved. I was, however, also moved by the individual who came to us under the statute and said please help me if you can.

And we concluded after a very extensive and, I believe, professional and responsible investigation—we concluded that there was here a violation of the statute. I did not fire him, I did not reduce his grade. All I did was find the facts and report them.

He did not challenge our facts. They were reviewed and endorsed by responsible, upstanding public officials, and he decided to resign and take a partial pension. He could have stayed and fought; he did not. And I think at this late stage this is obviously regrettable from his point of view, but it is not something I can help.

The CHAIRMAN. I thank you very much.

Unless you have any questions, the hearing——

Senator THURMOND. I do not have any further questions.

The CHAIRMAN. The hearing is adjourned. Thank you.

[Whereupon, at 4:50 p.m., the committee was adjourned.]

KENNETH CONBOY

Birth:	June 3, 1938	New York, New York
Legal Residence:	New York	
Marital Status:	Single	
Education:	1957 - 1961	Fordham College A.B. degree
	1961 - 1964	University of Virginia Law School J.D. degree
	1977 - 1980	Columbia University M.A. degree (History)
Bar:	1966	New York
Military Service:	1964 - 1966	United States Army Captain
Experience:	1966 - 1977	Manhattan District Attorney's Ofc Trial Assistant Executive Assistant District Atty Chief of the Rackets Bureau ('75-'77)
	1978 - 1983	Deputy Commissioner and General Counsel to the New York Police
	1984 - 1986	New York City's Criminal Justice Coordinator
	1986 - present	New York City's Commissioner of Investigation
Office:	80 Maiden Lane New York, New York 10038 212 825-5913	
Home:	40 East 78th Street New York, New York 10021 212 772-3771	

To be United States District Judge for the Southern District of New York

BIOGRAPHY
April, 1987

KENNETH CONBOY is New York City's Commissioner of Investigation, an office to which he was appointed by Mayor Edward I. Koch on February 24, 1986. As head of the Department of Investigation he supervises 30 lawyers and a large staff of accountants, detectives and investigators. During the course of the 1986 municipal corruption scandal, he has broadly reorganized the Department, formally strengthened its ties to New York City and federal prosecutors, and restructured the City's Inspector General system.

Commissioner Conboy was New York City's Criminal Justice Coordinator, a statutory office of the City Charter, from January, 1984 to February, 1986. His primary legal responsibility was budgetary oversight for the City's $2.4 billion criminal justice system. His principal policy concerns were creation of computerized data systems to better organize and manage the case disposition process; statutory reform of the City's probation services; enactment of federal legislation authorizing intervention of the armed forces in the interdiction of the international drug traffic; creation of a $25 million capital program to renovate court buildings in New York City; broad capital expansion of the City's jail facilities in the wake of the 1983 federal court prisoner release order; and consolidation of police services in New York City. He was also the Mayor's senior advisor on criminal justice matters.

As Deputy Commissioner and General Counsel to the New York Police from February, 1978 to December, 1983, he supervised a legal staff of 30 lawyers and played a principal role in shaping Department policy and strategy in a variety of State and federal litigations involving free speech and security issues in the policing of demonstrations at foreign missions; privacy issues associated with police intelligence surveillance and data gathering practices; affirmative action and racial quotas in the appointment of minority candidates to the Force; claims under federal and State pension laws; and collective bargaining grievances and issues. He was also responsible for the civil prosecution of approximately 1,000 disciplinary cases annually; the creation and funding of the City's career criminal program, which became a national model; and the broad legal training of the Force. In this connection, he supervised the development and production of a series of privately financed Constitutional Law training films which have won a series of national prizes and are now used broadly in police departments across the country. He was also Chairman of the Police Pension Fund, a statutory trust with assets in excess of one billion dollars.

Commissioner Conboy served from October, 1966 to February, 1977 in the Manhattan District Attorney's Office under Frank S. Hogan and Robert M. Morgenthau, where he was Trial Assistant, Executive Assistant District Attorney, and Chief of the Rackets Bureau. His more prominent cases involved members of the underground terrorist group, the Weathermen, in connection with the firebombing of the First National City Bank; a vertical police corruption conspiracy involving 18 police officers and commanders and 19 racketeers; the extortion of the President of New York University by two faculty members in connection with the takeover by militant students of a Defense Department computer on the Washington Square campus; and the Blue Angel nightclub fire, in which a large number of patrons perished because of inadequate Building Code enforcement. He also prosecuted underworld figures involved in sweetheart contracts in the labor field, organized vice, the theft of securities from Wall Street brokerage houses, and the fixing of sport events.

From July, 1964 to September, 1966 he served in the United States Army and was honorably discharged in the rank of Captain.

Commissioner Conboy was appointed by Governor Mario Cuomo to the New York State Crime Control Planning Board, and by Governor Cuomo and Mayor Koch to a joint State/City Commission on Integrity in Government (Sovern Commission). He has been a member of the summer faculty of the Organized Crime Institute at Cornell Law School. His primer on the prosecution of testimonial crimes was published through the Law Enforcement Assistance Administration by Cornell Law School (1977), and at the invitation of the Appellate Division, First Department he contributed a review of the law of electronic surveillance for Criminal Trial Advocacy (1980).

He is a member of the New York State Bar Association, and has served on the Criminal Courts, Judiciary, Penology and Police Law and Policy Committees of the Association of the Bar of the City of New York. He has also served as a member of the Association's Criminal Justice Council. Commissioner Conboy is a director of the Catholic Interracial Council of New York.

He was born in Manhattan on June 3, 1938 and graduated from Fordham College and the University of Virginia Law School. He also holds a Masters Degree in History from Columbia University.

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name:

Kenneth Robert O'Grady Conboy

2. Address:

Department of Investigation (Office)
Of the City of New York
80 Maiden Lane
New York, N.Y. 10038
(212) 825-5913

40 East 78th Street (Residence)
New York, N.Y. 10021
(212) 772-3771

3. Date and place of birth:

June 3, 1938
New York City

4. Marital Status:

Single

5. Education:

Fordham College, 1957-1961, A.B. (History)
University of Virginia Law School, 1961-1964, LLB
(converted J.D. 1970)
Columbia University Graduate School of Arts and Sciences 1977-1980,
M.A. (History)

6. Employment Record: List all business or professional corporations, firms, or other enterprises, partnerships, institutions, and organizations, non-profit or otherwise, with which you were connected as an officer, director, partner, proprietor or employee since graduation from college.

See answers 17 and 10

7. Military Service:
Have you had any military service? If so, give dates, branch of service, rank, serial number and type of discharge received.

Yes.
June 1961 - July 1964 (Reserve)
July 1964 - September 1966 (Active Duty)
United States Army
Captain
Service #05009866
Honorable Discharge

8. Honors and Awards:
List any scholarships, fellowships, honorary degrees and honorary society memberships:

Regents Scholarship, Fordham University
Philip Francis Dupont Scholarship, University of Virginia Law School
Masters Prize, Columbia University Graduate School of Arts and Sciences
Award, New York State Bar Association, (recognition of service as Police General Counsel)

9. Bar Associations:
List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices you have held in such groups.

Association of the Bar of the City of New York (1970-Present)
Criminal Courts Committee
Judiciary Committee
Penology Committee
Police Law and Policy Committee
Criminal Justice Council

New York State Bar Association (1978-Present)
Executive Committee, Criminal Justice Section

10. Other Memberships:
List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Fordham College Alumni Association (Vice President)
University of Virginia Alumni Association
Columbia University Alumni Association
Catholic Interracial Council of New York (Director)
American Society for Legal History
Central Park Conservancy
Hogan-Morgenthau Associates
Advisory Board, History of New York City Encyclopedia Project, Yale University Press

11. Court Admission:
List all courts in which you have been admitted to practice, with dates of admission and lapses, if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

New York (Second Judicial Department), December 1966
U.S. District Court, S.D.N.Y., April 1969
U.S. Court of Appeals, Second Circuit, October 1980
U.S. Supreme Court, March 1979

12. Published writings:
List the titles, publishers, and dates of books, articles, reports and other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

1. "Grand Jury Examination of the Recalcitrant Witness" (Lecture and Materials on Testimonial Crimes) published by Cornell Law School, Organized Crime Institute, 1977.

2. "Law of Electronic Surveillance," in Criminal Trial Advocacy (Volume published by Appellate Division, First Department) 1977 (3rd edition) 1980 (4th edition) 1984 (5th edition) and 1987 (6th edition).

3. Responsibility, Punishment and Justice: Remarks on the Crime Problem in America, Speech, Columbia University, February 23, 1983.

4. Our Secret Courts of Public Prosecution; Remarks at the Revson Fellows Dinner, Columbia University, February 12, 1985.

5. Reducing Public Corruption: Character, Culture and Punishment; Speech, Fordham Law School Urban Law Journal Dinner, March 24, 1986.

6. Lessons of the Corruption Scandal; Speech, New York County Lawyers Association, November 20, 1986.

7. Letters (3) published in the New York Times.

13. Health:
What is the present state of your health? List the date of your last physical examination.

Excellent. July 7, 1987

14. Judicial Office: State any judicial offices you have held.

None

15. Citations: If you are or have been a judge, provide citations for the ten most significant opinions you have written.

I have never held judicial office.

16. Public Office: State chronologically any public offices you have held other than judicial offices, including the terms of service and whether such positions were elected or appointed. State any unsuccessful candidacies for elective office.

In addition to career public service positions detailed in Question 17, I was a staff member of Mayor John V. Lindsay's Ad Hoc Committee on Civil Disorders in 1969; I was appointed by Chief Judge Lawrence Cook to the Advisory Conference on Fair Trial and Free Press Guidelines and Policy in 1978; by Governor Mario Cuomo to the New York State Crime Control Planning Board in 1985, and by Governor Cuomo and Mayor Edward I. Koch to the Joint City-State Commission on Integrity in Government (Sovern Commission) in 1986. Service in each was for one year or less, except for the Crime Control Board, on which I continue to serve.

I have never run for elective office.

17. Legal Career:

a. Describe chronologically your law practice and experience after your graduation from law school, including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.

2. whether you practiced alone, and if so, the addresses and the dates.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

From July, 1964 to September, 1966 I served on active duty in the United States Army.

From October, 1966 to February 1977 I served in the Manhattan District Attorney's Office, 1 Hogan Place, New York, New York, under Frank S. Hogan and Robert M. Morgenthau, where I was Trial Assistant, Executive Assistant District Attorney, and Chief of the Rackets Bureau. My more prominent cases involved members of the underground terrorist group, the Weathermen, in connection with the firebombing of the First National City Bank; a vertical police corruption conspiracy involving 18 police officers and commanders and 19 racketeers; the extortion of the President of New York University by two faculty members in connection with the takeover by militant students of a Defense Department computer on the Washington Square Campus; and the Blue Angel nightclub fire, in which a number of patrons perished and where there was inadequate Building Code enforcement. As Bureau Chief from 1975 through 1977, I supervised the work of fifteen lawyers investigating and prosecuting cases in the racketeering and official corruption fields, involving sweetheart contracts in the labor field, organized vice, the theft of securities from Wall Street brokerage houses, and the fixing of sport events.

As Deputy Commissioner and General Counsel to the New York Police, 1 Police Plaza, New York, New York, from February 1978 to December, 1983, I supervised a legal staff of 30 lawyers and played a principal role in shaping Department policy and strategy in a variety of State and federal litigations involving free speech and security issues in the policing of demonstrations at foreign missions; privacy issues associated with police intelligence surveillance and data gathering practices; affirmative action in the appointment of minority candidates to the Force; claims under federal and State pension laws; and collective bargaining grievances and issues. I was also responsible for the civil prosecution of approximately 1,000 disciplinary cases annually; the creation and funding of the City's career criminal program, which became a national model; and the broad legal training of the Force. In this connection, I supervised the development and production of a series of privately financed Constitutional Law training films which have won national prizes. I was also Chairman of the Police Pension Fund, a statutory trust with assets in excess of one billion dollars.

I was New York City's Criminal Justice Coordinator, Office of the Mayor, 250 Broadway, New York, New York, a statutory office of the City Charter, from January, 1984 to February, 1986. My primary legal responsibility was budgetary oversight for the City's $2.4 billion criminal justice system. My principal policy concerns were creation of computerized data systems to better organize and manage the case disposition process; statutory reform of the City's probation services; enactment of federal legislation authorizing intervention of the armed forces in the interdiction of the international drug traffic; creation of a $25 million capital program to renovate court buildings in New York City; broad capital expansion of the City's jail facilities in the wake of the 1983 federal court prisoner release order; and consolidation of police services in New York City. I was also the Mayor's senior advisor on criminal justice matters.

I am presently New York City's Commissioner of Investigation, 80 Maiden Lane, New York, New York, an office to which I was appointed by Mayor Edward I. Koch on February 24, 1986, in the midst of a major municipal corruption scandal. As head of the Department of Investigation I supervise 30 lawyers and a large staff of accountants, detectives and investigators. During the course of the scandal, I have broadly reorganized the Department, formally strengthened its ties to New York City and federal prosecutors, and restructured the City's Inspector General system.

b. 1.) What has been the general character of your practice, dividing it into periods with dates, if its character has changed over the years?

The general character of my practice has been public service, as prosecutor, agency counsel, Mayoral advisor in the field of criminal justice policy, and chief investigative officer of New York City. My professional career has evolved from extensive and broad litigation in the criminal side of public law during the first ten years, to an advisory, strategic and executive role in the civil side of public law during the second ten years.

2.) Describe your typical clients, and mention the areas, if any, in which you have specialized.

My clients have been the State of New York as public prosecutor, the New York Police as General Counsel to the Department, the Mayor of New York as a principal advisor, and, as Commissioner of Investigation, the City of New York, and to the extent that the Department has participated in federal criminal investigations, the United States Government. I have specialized in State criminal law and procedure, federal constitutional law, the law of electronic surveillance, State civil service law, police power, legislation, pension rights, public sector collective bargaining and administrative law.

c. 1.) Did you appear in court regularly, occasionally or not at all? If the frequency of your appearances in court has varied during this period, describe each such variance, giving the dates thereof.

In the period June, 1982 to the present, I have not personally conducted litigation in Court, although I have supervised other lawyers who have. From January, 1984 to February 1986, I played a role in two federal law suits brought by the Legal Aid Society involving jail confinement conditions and standards, and impermissable delays in arraignment of prisoners in police custody. The principal counsel for the City in these cases was the Corporation Counsel's Office. The jail conditions case was Benjamin v. Malcolm, conducted throughout this period before the Hon. Morris Lasker in the United States District Court for the Southern District of New York. At the invitation of Judge Lasker, I participated in negotiations on behalf of the Mayor with the Legal Aid Society, to resolve issues arising out of inmate overcrowding at facilities on Rikers Island. The arraignment delay case was Williams v. Ward, before the Hon. Constance Baker Motley in the United States District Court, Southern District of New York. From June, 1982 through January 1984 as General Counsel to the New York Police, I directly supervised the courtroom work of Rosemary Carroll, Esq. who appeared in Handschu v. Special Services Division, pending throughout this period before the Hon. Charles S. Haight, Jr., United States District Court, Southern District of New York, involving privacy issues associated with police intelligence surveillance and data gathering practices; and Guardians Association v. New York City Police, before the Honorable Robert L. Carter, United States District Court, Southern District of New York, involving affirmative action issues in the appointment of minority candidates to the Force. There were also during the period 1978 to 1983 scores of civil service, pension, forfeiture and civil rights cases in which I played a supervisory or strategic, but not a direct courtroom, role as Police General Counsel. For the period January 1975 to January 1978 I supervised approximately 15 lawyers as Chief of the Rackets Bureau in the Manhattan District Attorney's Office. During this period, I oversaw the prosecutions of approximately 150 felony indictments in State Supreme Court. From October 1966 to March 1974, as Trial Assistant and Senior Trial Assistant in the Manhattan District Attorney's Office, I personally prosecuted over 200 cases in the Criminal and Supreme Courts of New York County.

2. What percentage of these appearances was in

1)	Federal courts	0%
2)	State courts of record	100%
3)	Other courts	0%

3. What percentage of your litigation was

1)	Civil	0%
2)	Criminal	100%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

All my courtroom work has been done in State courts of record with the exception of the supervisory roles in federal cases described above, has been principally criminal, and as a State prosecutor, has been principally before juries. For the seven year period I was a line prosecutor, I averaged approximately ten cases tried to verdict as sole counsel each year.

5. What percentage of these trials was

1)	Jury	75%°
2)	Non-jury	25%

18. Litigation:

Describe ten of the most significant litigated matters which you personally handled and give the citations, if the cases were reported. Give a capsule summary of the substance of each case and a succinct statement of what you believe to be the particular significance of the case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case, (a) the dates of the trial period or periods, (b) the name of the court and the judge before whom the case was tried, (c) the individual name, address and telephone numbers of principal counsel for each of the other parties.

° People v William Phillips, in which the defendant was charged with two counts of Murder and one count of Attempted Murder, in the shooting of a prostitute, her manager and a patron in a bordello on the upper east side of Manhattan on Christmas Eve, 1968. The Chief Prosecutor in the case, tried in 1973, before the Honorable John M. Murtagh, was the Honorable John F. Keenan, now United States District Judge. I served as Second Prosecutor. The defendant, who was a police officer, was represented by F. Lee Bailey, Esq., 350 Fifth Avenue, Suite 4710, New York, N.Y. 10118, (212) 244-2000. The trial ended in a jury disagreement, but the defendant was later convicted at a second trial in which I did not participate. The case was significant because the defendant had been the principal witness for the Knapp Commission, and the trial was one of the most notorious prosecutions of the 1970's in New York City.

° People v. Irving Saypol, in which the defendant, a State Supreme Court Justice, was charged with one count of Bribery and three counts of Perjury. The indictment had been secured by Special Prosecutor Maurice Nadjari in 1976, and it was based upon extensive wire tapping. The case was transferred, on jurisdictional grounds, to the Manhattan District Attorney's Office, and protracted proceedings were conducted in late 1976, before the Hon. Leonard Sandler. The case was significant because the wiretap issue was exceedingly complex. I recommended suppression of the taps, because they constituted general warrants. As a result, the indictment was dismissed. In his opinion of January 17, 1977, Justice Sandler concluded that the argument and papers submitted by me in the case contained, "a thoughtful and illuminating analysis of these issues, which reflects an appropriate understanding of the complexities of a prosecuting office." The attorneys representing the defendant were Paul Weiss Rifkind Wharton & Garrison, 1285 Avenue of the Americas, New York, N.Y. 10019, (212) 373-3000, by Edward N. Costikyan, Esq.

- People v Arnold Squitieri and Alphonse Sisca, in which the defendants were charged with Murder and Bribery, involved a shooting of a drug courier in a public street in Spanish Harlem by notorious narcotics traffickers, who subsequently paid $10,000 to several police officers to release one of the defendants who had been apprehended after a vehicular chase a short distance from the scene of the crime. The prosecution was conducted by me in 1973, before the Hon. Miles Lane, and the attorneys for the defendants were Gino Gallina, Esq., himself later murdered in Greenwich Village by underworld figures, and Arthur L. Mass, Esq., Mass & Rudin, 45 Rockefeller Plaza-Suite 730, New York, N.Y. 10111, (212) 969-9200. The case was significant because it resulted in the conviction of defendants who were major racketeers with extensive and violent criminal histories, who had also corrupted police officers.

- People v Perry B. Duryea, et al, in which the defendant, the Speaker of the New York State Assembly was indicted for felonious violation of the State Election Law, in connection with the dissemination of fraudulent campaign literature, which purported to be issued by the Liberal Party, but was, in fact, printed and distributed by the Republican Party. Extensive motion practice on the constitutionality of the relevant Election Law Statute was conducted by me before the Hon. Burton B. Roberts in 1974. The lead counsel for Speaker Duryea was Shea & Gould, 330 Madison Avenue, New York, N.Y. 10017, (212) 370-8000, by Milton Gould, Esq. This case was significant because the indictment, which was ultimately dismissed, provoked a major constitutional contest on the viability of a section of the New York State Election Law. The indictment charged the defendants with disseminating 80,000 letters to enrolled members of the Liberal Party, purporting to come from an official campaign organization of that Party. The scheme was designed to divert votes from Democratic candidates to Liberal candidates, leading to the election of Republican candidates in specifically targeted Assembly Districts. The defendants challenged the statute as constitutionally over broad, in that it sought to punish anonymous as well as fraudulent campaign literature. The statute in question was enacted partially in response to a controversy associated with the printing and distribution of anonymous campaign literature in the 1961 primary and general elections in New York City. Of particular concern was a circular purportedly issued on behalf of Robert F. Wagner that implied anti-semitic animus toward Arthur Levitt, Democrat and Louis J. Lefkowitz, Republican, who were rival candidates.

  Subsequently §457 was supported and voted for by Perry B. Duryea, Jr., was passed overwhelmingly by both Houses of the New York State Legislature, and was approved by Governor Nelson A. Rockefeller. The statute became effective on September 1, 1967. In the fall of 1973, officials of the Liberal Party came to Attorney General Louis J. Lefkowitz, a Republican, and complained about the campaign literature in question and asked for an investigation. The Attorney General asked Manhattan District Attorney Frank S. Hogan to undertake an investigation and the case was assigned to me. In his decision declaring §457 unconstitutional, Supreme Court Justice Burton B. Roberts stated that "defendants cannot seriously claim at this stage, if ever, that the allegations in the indictment do not spell out a crime under the statute," and that "calculated falsehood is never protected by the First Amendment." Referring to the notorious "Citizens for Muskie" stationery pertaining to Senators Jackson and Humphrey in the 1972 Florida Democratic

Primary, the judge observed that "as we become nationally aware of the existence and impact of political dirty tricks and forgeries, the compelling state interest that would underlie such a statute has never been more obvious." The judge, however, concluded that the statute as drawn was over broad in that it sought to punish anonymous as well as fraudulent campaign literature. This decision was upheld on appeal. The case is reported at 351 NYS 2d 978.

- People v Richard Palmer, Sharon Krebs, et al, in which the defendants were charged, as members of a radical group, the Weathermen, with Conspiracy, Possession of Incendiary Devices, and the Attempted Fire Bombing of a branch of the First National City Bank at Madison Avenue and 92nd Street. This prosecution was conducted in 1971, before the Hon. Harold Birns, and the principal defense attorneys were Gerald B. Lefcourt, Esq., 148 East 78 Street, New York, N.Y. 10021, (212) 737-0400, and Daniel Pochoda, Esq., City University of New York, Law School at Queens College, 65-21 Main Street, Flushing, New York 11367, (718) 575-4327. The case was significant because the conviction of the defendants came during a period of widespread bombings across the county by dissident groups.

- People v Lt. Lawrence Koutnik, et al, in which 37 defendants, including 18 police officers and commanders and 19 racketeers, were charged in a single indictment with, in substance, participating in a systematic and controlled protection racket, in connection with broadly integrated illegal gambling operations throughout New York City. This case, which represented the largest number of defendants ever tried in one criminal proceeding in New York State, was brought to trial in 1971, before the Honorable Harold Birns, and turned upon the admissability of extensive eavesdropping evidence, conducted under Court Order for several years. The central issue was the retroactivity of the United States Supreme Court's 1968 landmark decision, Burger v New York. The principal attorney in this matter, was Richard A. Dienst, Esq., Dienst & Cahn, 225 Broadway, New York, N.Y. 10007, (212) 406-1700. Most of the defendants were convicted, although the Court of Appeals ultimately held Burger to be retroactive, thereby invalidating some of the convictions. This case is reported at 378 NYS 2d 360.

- People v Zincand and Dunleavy, in which the defendants, former police detectives, were charged with multiple counts of Perjury before a Grand Jury investigating Tampering with a Witness in a Homicide Case. This matter was tried in 1975 before the Hon. Arnold G. Fraiman. The defense counsel were Saxe, Bacon & Bolan, P.C., 39 East 68 Street, New York, N.Y. (212) 472-1400, by Roy M. Cohn, Esq. and Roy R. Kulcsar, Esq., now at 575 Madison Avenue-Suite 506, New York, N.Y. 10022 (212) 355-5995. The defendants were acquitted in a bench trial, but the case was significant because it led to major reform of the manner in which the Police Department maintained confidentiality of critical witnesses in homicide cases.

- People v Hugh Mulligan and Willie Flay, in which the defendants were charged with Criminal Contempt of a Grand Jury, which was investigating extensive police corruption in various headquarters' commands, where payoffs by racketeers to influence promotions in sensitive police units were being investigated. The defendants, who were tried separately in 1971 before the Hon. Harold Birns and the Hon. Myles Lane, were represented, respectively, by Herald Price Fahringer, Esq., Lipsitz, Green, Fahringer, Roll, Schuller & James, One Niagara Square, Buffalo, New York 14202, (716) 849-1333 and Jack S. Hoffinger, Esq.(P.C.), Hoffinger, Friedland, Dobrish, Bernfeld & Hasen, 110 East 59th Street, New York, N.Y. 10022-1392, (212) 421-4000. These cases led to refinement of the law of criminal contempt, as the convictions were sustained. The Mulligan case is reported at 323 NYS 2d 681.

- In the Matter of the Deaths of Seven Persons at the Blue Angel Cafe on December 18, 1975, an investigation to determine whether homicide charges should be brought against the owners of a Manhattan nightclub on the theory that patrons perished in a fire because of violations of the building and fire codes of the City, was conducted in 1976, before a New York County Grand Jury under the supervision of the Honorable Robert Haft, a Justice of the Supreme Court. As I recommended that no indictments be filed, and the Grand Jury so voted, there were no defense attorneys of record in the case. A Grand Jury Report was publicly filed in Court, however, recommending to the Mayor and the Governor that extensive statutory and administrative reforms be pursued in the area of code enforcement and public safety, which reforms were ultimately enacted.

- People v Lt. Francis X. Ward, in which the defendant, a New York City Police Commander, was charged with multiple counts of perjury committed before a Grand Jury investigating whether, in return for corrupt payments of money, officers were alerting racketeers in advance of the imminent execution of search warrants by enforcement units of the Police Department. The case was tried in 1971, before the Honorable Peter McQuillan, now Administrative Judge for New York County, and the defense attorneys were Richard Friedman, Esq., 475 Madison Avenue, New York, N.Y. 10017, (212) 425-2130, and Herman Tarnow, Esq., 369 Lexington Avenue, Avenue, New York, N.Y. 10017, (212) 972-2484. This conviction was the critical event in an investigation into systematic police corruption that ultimately led to the indictment and conviction of fifteen officers and racketeers. The case is reported at 355 NYS 2d 1016.

19. Legal Activities:

Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter.

As a seventeen year member of the Committees of the Association of the Bar of the City of New York, I have evaluated candidates for judicial office, pursued procedural reform for the State's criminal courts, and helped organize annual retreats on criminal justice matters for the State's law enforcement leadership. As Police General Counsel, I was responsible for the legal training and control of the largest metropolitan police force in the world. As the principal criminal justice advisor to the Mayor of New York, I testified many times in State and Federal legislative hearings and pursued the City's policy objectives in Albany and Washington. My service on the Sovern Commission, to which I was appointed by Covernor Cuomo and Mayor Koch, helped arouse the public to the need for reform adequate to the dimensions of the 1986 municipal corruption scandal in New York. I lectured on legal and public policy subjects at the Organized Crime Institute at Cornell Law School, and at the Graduate School of Journalism of Columbia University.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   With respect to my service in and employment by the New York City Government, I participate in a deferred compensation plan under §457 of the Internal Revenue Code, which account consists exclusively of contributions made by me. I also have substantial vested time and leave severance benefits that have accrued, and which are payable in lump sum immediately upon resignation.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   There are none.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   NO

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the Executive Personnel Financial Disclosure Report, required by the Ethics in Government Act of 1978, may be substituted here.)

1986	$84,659.96 (wages)	1987	$72,208.73 (wages)
	6,250.00 (deferred income)	to	3,750.00 (deferred income)
	660.44 (interest)	10/31/87	100.00 (approx.interest)
	428.91 (dividends)		1,766.38 (refunds)
	1,871.73 (refunds)		7,500.00 (approx. capital gains & dividends)
	2,510.04 (capital gains)		

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

   See attached Net Worth Statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   NO

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

(AS OF OCTOBER 31, 1987)

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	2,000 –	Notes payable to banks—secured	–
U.S. Government securities—add schedule		Notes payable to banks—unsecured	9,500 –
Listed securities—add schedule	45,000 –	Notes payable to relatives	–
Unlisted securities—add schedule	–	Notes payable to others	–
Accounts and notes receivable:		Accounts and bills due	–
Due from relatives and friends	–	Unpaid income tax	–
Due from others	–	Other unpaid tax and interest	–
Doubtful	–	Real estate mortgages payable—add schedule	–
Real estate owned—add schedule	–	Chattel mortgages and other liens payable	–
Real estate mortgages receivable	–	Other debts—itemize:	–
Autos and other personal property	40,000 –		
Cash value—life insurance	–		
Other assets—itemize:			
Deferred Compensation	15,000 –		
Severance Benefits	65,000 –		
		Total liabilities	9,500 –
		Net worth	157,500 –
Total assets	167,000 –	Total liabilities and net worth	
CONTINGENT LIABILITIES	NONE	GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule.)	NO
On leases or contracts		Are you defendant in any suits or legal actions?	NO
Legal Claims		Have you ever taken bankruptcy?	NO
Provision for Federal Income Tax			
Other special debt			

SCHEDULE: LISTED SECURITIES

1.) FIDELITY FUND:

2,203 Shares = $32,000

2.) GINNY MAE FUND:

1,278 Shares = $13,000

FIDELITY INVESTMENTS INC.

BOSTON, MASS.

DOJ 1978-10

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

During my early years of practice as a public prosecutor, I established a program with Catholic Charities of the Archdiocese of New York, aimed at rescuing disadvantaged teenagers through diversion of minor criminal cases to a boarding and counseling program operated by the Sisters of Charity. As Deputy Police Commissioner, I was active in the support of the Police Athletic League, a private support organization, largely dedicated to the guidance and counseling of disadvantaged youth in various police precincts throughout the City. In this position, I was instrumental in the development of an extensive study of crime patterns which led to reallocation of patrol resources to the inner city, and met regularly with community and neighborhood leaders to address the problem of disproportionate victimization by crime upon minority and disadvantaged citizens. As the City's principal criminal justice official in the years 1984-1985, I was a vigorous and persistent proponent of broadened budgetary allocations for the Legal Aid Society, which support was repeatedly and publicly acknowledged by Arthur L. Liman, Esquire, who was then the President of the Legal Aid Society. As a Director of the Catholic Interracial Council during the period 1985-1987, I supported the Council's programs for more harmonious race relations in New York City. During the winter of 1985-1986, I was a coordinator of a program at St. Ignatius Loyola R.C. Church in Manhattan for the sheltering of homeless persons.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates—through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I have never belonged to such an organization.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is not a selection commission, as such, that recommends nominations in the first instance. My nomination had its genesis in a professional working relationship that existed between me as New York City Criminal Justice Coordinator and Senator Alphonse M. D'Amato. During the period 1984-1986, I participated in a number of congressional hearings which were organized by the Senator, and worked with his staff on numerous projects in the criminal justice field, principally drug interdiction, prison overcrowding, and immigration issues. In the early spring of 1985, the Senator raised with Mayor Edward I. Koch the possibility of recommending me for a federal judgeship in Manhattan. At the time, there were a number

of vacancies and the Mayor expressed his enthisiastic support. Shortly thereafter, I discussed the matter with Fred Fielding, who at that time was Counsel to President Reagan, and who has been a long time personal friend of mine, since our law school days at the University of Virginia. After the Mayor's reelection in the fall of 1985, the matter became a subject of private discussion between me and the Senator. Just after the Mayor's inauguration for a third term in January 1986, however, a major municipal corruption scandal erupted and the Mayor asked me to defer, for the time being, pursuit of the judicial recommendation, to become the City's Commissioner of Investigation. In January 1987, Senator D'Amato formally announced his support for my appointment to the District Court. Shortly thereafter I was interviewed by the Senator's Judiciary Screening Committee and was approved for the appointment. In May, 1987, my credentials were reviewed and I was interviewed by the Judiciary Committee of the Association of the Bar of the City of New York and was approved for the appointment. During this period, I was also interviewed by a number of senior officials of the Justice Department, including the Honorable Arnold Burns, the Deputy Attorney General. The Justice Department then decided to support the recommendation of Senator D'Amato. Following a clearance investigation by the Federal Bureau of Investigation and the approval of the Standing Committee on the Federal Judiciary of the American Bar Association, I was nominated by the President.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

NO.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

There is no question, on an empirical basis, that our judicial branch of government has dramatically broadened its role in the field of public policy during the past quarter century. Scholars, lawyers and commentators, regardless of philosophy, political opinion or general point of view, do not broadly dispute this enlargement of role as a de facto reality. During this period, the parameters of class action status have been extended, administrative control and oversight of executive functions by courts have increased, and more comprehensive, intricate and pervasive court decrees with respect to municipal and state governments have been a prominent and developing characteristic of federal judicial power.

Accordingly, one could, as a general proposition, sustain the claim that "judicial activism" has been a dominating characteristic of federal law in this country during the past quarter century. It is my belief that federal judges are obligated to pursue, generally, a policy of "judicial restraint," since our Constitution is, as a supreme invention of human genius, the configuration of governmental powers in "delicate balance." An aggressive and domineering judiciary could destroy that balance.

The transcending obligation of district court judges, however, is to follow the law as handed down by the circuit courts and the Supreme Court. District judges who ignore or distort precedents set down by federal appellate courts because such precedent is not consistent with their personal views as to what the law ought to be, do grave injury to the federal judicial system. The question of "judicial activism" versus "judicial restraint" is, therefore, least relevant to the work of a district court judge. Such a judge owes it to the litigants before him, his oath of office, and the Constitution, to apply the law as it has been and is set down by the higher federal courts.

AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
1800 M Street, NW
Washington, DC 20036
(202) 331-2210

CHAIRMAN
Harold R. Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112
FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101
SECOND CIRCUIT
William E. Willis
125 Broad Street
New York, NY 10004
THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103
FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510
FIFTH CIRCUIT
Lloyd Lochridge
Suite 1300
919 Congress Avenue
Austin, TX 78701
SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215
SEVENTH CIRCUIT
Joan M. Hall
Suite 4300
One IBM Plaza
Chicago, IL 60611
EIGHTH CIRCUIT
James W. Hewitt
Post Office Box 80268
1815 Y Street
Lincoln, NE 68501
NINTH CIRCUIT
J. David Andrews
1900 Washington Building
Seattle, WA 98101
Samuel L. Williams
45th Floor
355 South Grand Avenue
Los Angeles, CA 90071
TENTH CIRCUIT
James A. Clark
Suite 100
303 East 17th Avenue
Denver, CO 80203
ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Post Office Box 78
2 Dexter Avenue
Montgomery, AL 36101
DISTRICT OF COLUMBIA CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 I Street, NW
Washington, DC 20006
FEDERAL CIRCUIT
John D. Lane
Suite 600
1666 K Street, NW
Washington, DC 20006
BOARD OF GOVERNORS LIAISON
Sharp Whitmore
2885 Gird Road
Fallbrook, CA 92028
STAFF LIAISON
Irene R. Emsellem
2nd Floor, South Lobby
1800 M Street, NW
Washington, DC 20036
(202) 331-2210
ABAINET: ABA 461

November 6, 1987

CONFIDENTIAL

The Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: KENNETH R. CONBOY
United States District Court
for the Southern District of
New York

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Kenneth Conboy for appointment as Judge of the United States District Court for the Southern District of New York.

A majority of our Committee is of the opinion that Commissioner Conboy is "Qualified" for this appointment. The minority found him to be Well Qualified.

Sincerely yours,

Harold R. Tyler, Jr.
Chairman

cc: All Committee Members

Sheridan,
Garrahan
&
Lander

Attorneys At Law

November 19, 1987

Senator Patrick J. Leahy
Senate Judiciary Committee
Room 224
Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Leahy:

I am writing to address a question which was raised in correspondence to the Judiciary Committee concerning the nomination of Edward F. Harrington to be a United States District Judge for the District of Massachusetts. The issue concerns a report of a Framingham Police Officer who apparently suggested that Mr. Harrington acted unprofessionally towards him in a case before the Framingham District Court in March or April of this year. I was co-counsel with Mr. Harrington at the time and I was with him during the course of the hearing and the plea bargaining which preceded the hearing.

Our client had been charged with running a lottery in connection with several arcade machines which distributed toys after a deposit of money into the machine. The underlying event which triggered the criminal charges was a warrantless search and seizure which occurred late on a Friday afternoon prior to the Washington's Birthday weekend. The Framingham District Court later scheduled a hearing to determine whether criminal charges should issue and prior to the hearing I had written to the District Attorney to convey my concern about the warrantless and obviously unconstitutional nature of the underlying search.

The Police Department determined that they were going to proceed with criminal charges, and, indeed, after the first search the police sought a warrant and seized several other machines. When the "show cause" hearing was scheduled some of the machines seized had been seized with a warrant and some of the machines had been seized without a warrant. Our client had authorized us to offer to remove all of the machines that concerned the police department. At no time prior to the original seizure had the police department notified our client that the machines were unauthorized or illegal.

With our client's authorization and prior to the commencement of the show cause hearing Mr. Harrington and I spoke with the prosecuting police officer in an attempt to plea bargain, or agree on a disposition. We pointed out that the original warrantless search and seizure was obviously unconstitutional and

The Meadows • 161 Worcester Road • P.O. Box 867 • (617) 879-5700 • Telecopier (617) 872-1092 • Framingham, Massachusetts 01701

that if our client was prepared to authorized a removal of all machines, then perhaps the most appropriate disposition was to agree with the police department to remove all offending machines and forego going forward with criminal charges against an individual who had no prior criminal record and who was recognized as an outstanding member of the community. We noted that our client necessarily would have to defend the warrantless search and seizure on the basis that his civil rights were violated and that there were federal remedies under 42 U. S. C. §1983 for willful and intentional violations of federally protected rights, including Fourth Amendment rights. If the police were agreeable to a non-criminal disposition we were prepared to categorically waive any federal civil rights remedies for the unlawful search.

There was no acrimony whatsoever in the discussion. No voices were raised. In fact Mr. Harrington who was appearing as criminal defense counsel for our client was not primarily engaged in the discussion of whether or not a civil rights action might follow. Nevertheless, when the Civil Rights Act was mentioned to the police officer he became visibly disturbed and accused Mr. Harrington and me of threatening him. The moment the officer mentioned a threat Mr. Harrington and I left the discussion. There was no further plea bargaining with the officer.

The Framingham Police Department proceeded with an application for the criminal complaint. The cases went forward and were disposed of by the District Court without a finding. Our client agreed to pay court costs.

I would like to emphasize that the attempted plea bargain discussions with the police prosecutor were highly professional in all respects. Ted Harrington was courteous, temperate and fair in everything that transpired during the course of the conversations with the police. The moment that the police officer betrayed animosity and exhibited his perception that he was being threatened Mr. Harrington and I promptly withdrew from any further attempts at negotiation. At no point during the entire discussion was a voice raised by anyone party to the conversations.

I hope this helps to clarify any questions that may have been prompted by the report. Please feel free to call on me for any additional information that might be necessary.

Very truly yours,

SHERIDAN, GARRAHAN & LANDER

Michael C. Donahue

MCD/mr
cc: The Honorable Edward M. Kennedy

Daniel G. Harrington
Attorney at Law

10 Tremont Street, Boston 02108
Suite 530
(617) 227-1765

December 14, 1987

Edward J. Harrington
of Cnsl. Sheridan, Garahan and Lander
161 Worcester Road
P.O. Box 867
Framingham MA 01701

Re: Alice Richmond

Dear Ted:

Enclosed please find a copy of letter which Tom Moran sent to the Senate Judiciary Committee which I received in today's mail.

This letter confirms what we always knew, i.e. Alice lied to the Court.

I hope this letter will aid you in the nominating proceedings.

Very truly yours,

Daniel G. Harrington

DGH/lg
enc

Thomas Moran
84 Romsey Street
Dorchester, MA 02125

December 11, 1987

Senator Patrick Leahy
Senate Judiciary Committee
Room 224 - Dirksen Office Building
Washington D.C. 20510

Sir:

I am writing this letter in response to an article that I read in the Boston Globe and Boston Herald today on the hearing before the Senate Judiciary Committee on Ted Harrington; the allegations by Alice Richmond.

I was the investigating officer on the disappearance of David DeWilde starting in January of 1975. DeWilde lived and worked in Brighton. His mother and wife were adamant that something had happened to him.

Alice Richmond at this time was investigating the homicide of Edwin Bacon, a high profile person in society in Boston. James Blaikie was the target by both of us. His mother had supposedly shot herself in the head. His father died of pneumonia conveniently, his partner in the insurance business committee suicide and changed to homicide later.

In the course of my investigation I interviewed Blaikie on three separate occasions. Twice in January and the third time on February 6, 1975. This time I informed him of his rights under Miranda and he still agreed to talk to me and Det. Sgt. John Doris. Notes were taken on all three occasions. I not only accused him of killing DeWilde but also his mother, father and Bacon. He was allowed to go, we had no Corpus Delecti.

In November 1975 DeWilde's body was found in the cellar of Blaikie's former home in Brookline and the floodgates opened with TV and the press. Alice Richmond was called by me from the scene and informed of the facts. I told her we didn't have the case. It was in the jurisdiction of the Brookline, P.D. & Norfolk County. She came anyway. By the time we came out of the cellar the street was full of cameras and reporters. Everybody was talking to reporters, and no one called the family. I reached both his mother and wife before they saw it on television.

Richmond became a special prosecutor for the Attorney General's Office and was assigned the case. Over the months Dan and Ted Harrington became the counsel for Blaikie and there were motions, hearings, etc. I knew of the discovery motion. She asked me to write up the question and answer interrogations and I submitted three. One for each time I spoke to him. The first two I was fishing when I questioned Blaikie and he was very talkative. We checked out every person DeWilde associated with, male and female. He was involved with marijuana. A cocaine deal ultimately got him killed. The third time he came in (he refused to see me at his home) he was confronted with the lies he had told us, money he owed DeWilde and a visit to the vault with DeWilde the day he received $12,000 from DeWilde.

During the trial in Norfolk County the day before I was to testify I asked her about the report for the third interrogation and she insisted I forget about the third interrogation that only two reports were submitted in discovery and I was to limit myself to these two reports. I was bullshit. I had worked hard on this case for months. I promised the mother and wife Blaikie wouldn't get away with it. I believed and still do that this man had killed four people. Blaikie had to have told the Harringtons that he was at the police station three times. I couldn't believe she was jeopardizing the whole case.

The following morning, August 19, 1976, the day I was to testify, I called Newman Flanagan at the D.A.'s office and also Capt. William Hogan, one of the best legal men we had in the Boston Police. I gave each of them the dilemma I was in and both advised I tell the truth and whatever happens, so be it.

Later in the morning while on the witness stand, I was questioned by Miss Richmond about the first report and then the second report. I couldn't believe she would ask me "Were there any other reports?" I just sat there numb and answered yes there was a third report. There was an objection, a few more questions, and a recess. The attorneys went to the Judge's Chambers and when they returned there was a mistrial declared.

Alice Richmond protested to Judge McGuire that all three reports were incorporated into two reports that were submitted to defense counsel. This was a lie. I knew it, the other police officers knew it, and the Defense Counsel knew it. I commend Ted Harrington for calling a spade a spade.

I only know Ted Harrington from the Blaikie trial and what I read in the newspapers. I would hate to think the committee would give any credence to Alice Richmond's testimony. Relative to being called a lying bitch, that's exactly what she was.

Sincerely,

Thomas Moran
Detective BPD Retired

RYAN & WHITE, P. C.
ATTORNEYS AND COUNSELLORS AT LAW
1500 MAIN STREET
P. O. BOX 15629 BAYSTATE WEST
SPRINGFIELD, MASSACHUSETTS 01115

WILLIAM G. WHITE
CHARLES V. RYAN
PHILIP J. RYAN
GARY E. MARTINELLI
GEORGE F. KELLY
CALVIN W. ANNINO, JR.
MARY R. DOWNEY COSTELLO
JOSEPH P. PESSOLANO
BRADFORD R. MARTIN, JR.
JOHN M. DISCENZA
MARK E. DRAPER
JOAN C. STEIGER
RICHARD J. FONTAINE
KEVIN D. WITHERS
LOUIS S. MOORE
JAMES M. HANNIFAN
TIMOTHY J. RYAN

TELEPHONE
AREA CODE 413
739-6971

TELECOPIER
AREA CODE 413
739-1441

December 4, 1987

Honorable Patrick J. Leahy
Senate Judiciary Committee
Room 224
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

I understand that your Committee is considering the nomination of Edward F. Harrington to the United States District Court for the District of Massachusetts.

I first became acquainted with "Ted" Harrington shortly after I began my career as a prosecutor with the Organized Crime Section of the Justice Department in 1971. I served under him briefly when he headed the New England Strike Force in Boston, and later as an assistant during his tenure as United States Attorney.

I understand that one of the cases which I prosecuted as Deputy Chief of the Strike Force has become the subject of discussion during the confirmation process. I speak of the case of United States v. Paul Ciampaglia, et al which was a large-scale bankruptcy fraud which generated over a million dollars of unpaid-for merchandise. Paul Ciampaglia, a known associate of Boston organized crime figures, and one Stanley McNiff, a Shirley, Massachusetts businessman, were the principle co-conspirators in this case.

The key government witness in the case had been placed in the witness protection program, and had been provided subsistence and relocation allowances for him and his wife, and had been promised that he would not be prosecuted, in exchange for his truthful testimony at the grand jury and trial.

During his cross-examination, the witness stopped testifying and was provided counsel to advise him with respect to the scope of immunity he had been given. Because the Chief of the Strike Force was unavailable, I sought the assistance of Mr. Harrington. It would have been extremely difficult to process an immunity request, given the time constraints and, moreover, it would have been extremely harmful to the case to have the jury perceive that the United States had somehow given the witness a "better deal" at his insistence. Mr. Harrington agreed with me, and told the witness' counsel via the telephone (in my presence) that the witness had already been provided substantial benefits in exchange for his promise to provide full and truthful testimony at trial, and that the Government would continue to be bound by its promise of immunity. Mr. Harrington also advised the witness' counsel that the Government's promise of immunity was conditioned on the witness' complying with his promise to testify on behalf of the United States and, should he fail to testify, he would be prosecuted for his part in the fraudulent scheme.

The witness, after consulting with his counsel, agreed to resume the witness stand and finished his testimony. At the close of the evidence, the jury returned verdicts of guilty against all defendants. The propriety of the government's handling of the witness' hesitancy while testifying was the subject of post-trial motions and a hearing. The trial court upheld the convictions, and rejected the defendants' complaint concerning the government's handling of the witness' hesitancy. The case was then given a full review in the First Circuit Court of Appeals where all of the judgments of guilty were affirmed.

I hope that this discussion of the Ciampaglia case will assist you, the members of your Committee, and the Senate in coming to what I hope will be a speedy and unanimous confirmation of Mr. Harrington.

Very truly yours,

George F. Kelly

George F. Kelly

GFK/meg

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA vs. STANLEY McNIFF, et al	Criminal Action No. 79-17-MA

AFFIDAVIT OF VIRGINIA McNIFF

I, Virginia McNiff, being duly sworn, depose and say as follows:

1. I am the wife of defendant Stanley McNiff.

2. On Monday, August 11, 1980, I received a message from Sherry Power, which said that she had to talk to Mr. McNiff and me about my husband's case. Mr. McNiff and I made arrangements to meet Mrs. Power and her husband Leo Power that night in Maine.

3. My husband and I met with Mrs. Power on August 11, 1980 in Maine. We were told that Mr. Power was unable to attend due to a rib injury which he had incurred that day.

4. At the August 11, 1980 meeting, Sherry Power told Mr. McNiff and me the following narrative of events which occurred between the 9th and 10th days (Friday, March 30, 1979, and Monday, April 2, 1979) of my husbands trial:

> On Thursday, March 29, 1979, Assistant United States Attorney George Kelly told her that she could go home to Maine because she was not going to be needed to testify at trial.

On Friday, March 30, 1979, Assistant United States Attorney George Kelly called her and told her "get back to Boston right away and talk some sense into Leo. He just stopped all the proceedings." Mr. Kelly did not tell Mrs. Power what had happened but told her simply that she had to leave right away.

On arrival in Boston, Mrs. Power met with United States Attorney Edward Harrington and Mr. Kelly. Both were upset that they were not able to speak to Mr. Power, both because of an order of the Court and because Mr. Stein, Mr. Power's court appointed attorney, had refused to allow them to speak with Mr. Power.

Mr. Harrington told Mrs. Power that if Mr. Power did not testify, Mr. Harrington would make sure that Mr. Power was sentenced to 15 years imprisonment. Mr. Harrington further stated that he would pursue Mr. Power to the ends of the earth if Mr. Power maintained his refusal to testify.

Mrs. Power was then taken to the hotel where Mr. Power was staying with instructions to work on him to get him to testify. Mr. Kelly and Mr. Harrington called from time to time during the weekend between the 9th and 10th days of trial to see what progress she was making on their behalf. Mr. Power had decided not to testify, but Mrs. Power kept talking to him telling him over and over again what Mr. Harrington and Mr. Kelly had threatened.

On Monday, April 2, 1979, Mrs. Power met with Mr. Kelly and Mr. Harrington. After Mr. Kelly had gone t the Courtroom, Mrs. Power told Mr. Harrington that Mr. Power was going to testify. Mr. Harrington immediately left for the Courtroom and, in transit to the Courtroom, told Mrs. Power that he wanted to be present in the Courtroom so that Mr. Power would see him there to make sure he testified. He also stated that he felt his presence would make Attorney's Fares and Attorney Sullivan's cross-examination less rigorous.

Mrs. Power further stated that Mr. Kelly had induced Mr. Power to testify by misrepresenting to him that Mr. McNiff had testified against Mr. Power durir grand jury proceedings. As a result of Mr. Kelly's misrepresentations, Mr. Power acted as an informant and testified against Mr. McNiff.

Signed under the pains and penalties of perjury this 22nd day August, 1980.

Virginia McNiff

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Lowell, August 22, 1980

Then personally appeared the above-named and acknowledged the foregoing to be true to the best of her knowledge and belief, before me,

Notary Public
My Commission Expires:

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Criminal Case
No. 79-00017

MAZZONE, D. J.

FILED
IN CLERK'S OFFICE
JAN 9 5 03 PM '81
U.S. DISTRICT COURT
DISTRICT OF MASS.

UNITED STATES OF AMERICA

V.

STANLEY McNIFF, ET AL.

STATEMENT - CHARLOTTE POWER

Noted and ordered filed
Copy of the docket entry is to be forwarded to counsel
A. David Mazzone
USDJ 1/9/81

I, Charlotte A. Power, being of sound mind and body, do now go to the United States District Court of [illegible], and the Honorable Judge D. J. Mazzone, to enter this statement into the court's record. This statement is freely given, [illegible] of any sort, by anyone. This statement is made to clarify any doubts that may exist concerning the actions of myself, my husband (Leo J. Power) defendants within this case, and government attorneys involved. It is given to clear all parties involved of alleged acts of collusion. I also give this testimony to curtail my involvement with this case.

On March 28th, 1979, I was told by U.S. Attorney George Kelly, that my testimony would not be needed in this case and that I could return home. He also stated that my husband Leo should be through with his testimony by the first part of the week and then he would be able to return home. I returned home that night.

On March, 29th, 197[illegible] I was told by my neighbor that I had a phone call while I was out. I was to return the call. I beleive that it was from either Postal Inspector John Dunn, or by U.S. Attorney Kelly. I then returned the call and wanted to know what was wrong. I was told that Leo had stopped the case and refused to testify and that I should talk to him and straighten him out. I then tried to call Leo at the hotel that they had for him, and when I received no answer, I got worried. I drove down to the hotel that night. It was too late to speak to anyone that night (Mr Kelly or Mr Dunn), so I just talked to Leo. Leo told me that he felt that he was being railroaded by the [illegible] as far as State charges went.

[illegible] Power PAGE 1

On March 30th, 1979, I called Inspector Dunn and Mr Kelly, to notify them that I was back. When speaking to Mr Kelly, he basically wanted me to know that Leo had gone too far to turn back now, and that after he (Mr. Kelly) had spoken to U.S. Attorney Harrington, that Mr. Harrington was extremely upset with Leo for stopping the trial and that if Leo did not testify that he would chase him to the ends of the earth. He reminded me of the deal that was made - for Leo's complete testimony- and that we would have to trust himself and Mr. Harrington as far as State charges go. I spent the entire weekend with my husband, convincing him that if he were to back out of the deal that he made with the government that he could go to jail. The several conversations that Mr Kelly and myself had over that weekend - March 30 and March 31st - only made me realize our position and that it was up to me to make Leo see the situation as it was.

Mr. Harrington never spoke to either Leo or myself during this time, and only spoke to me after the trial resumed. Mr. Kelly never spoke to Leo during this time, for he did not want, nor Leo did not want to break the sequestion order.

Although the promises made by the government have yet to be fullfilled, I feel that Mr. Harrington and Mr. Kelly have done and are doing everything possible to assist us in receiving them.

The language used during the conversations had some foul terminology involved, so I do not use direct quotes.

Again this statement is only clearing up questions that are being asked and to curtail our involvement. We do not wish to have to worry about defendants trying to locate us, nor for this to drag out. We also feel that Mr. Kelly only acted within the boundaries of his job. If the court wishes any more information, I will be glad to give it.

141

Charlotte M Power

PEABODY & BROWN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ONE BOSTON PLACE
BOSTON, MASSACHUSETTS 02108
(617) 723-8700
CABLE ADDRESS "PEABODYB"
TELEX NUMBER 951019

CORNELIUS J. MOYNIHAN, JR., P.C.

November 19, 1987

Honorable Patrick J. Leahy
United States Senator
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

Enclosed for your information is an endorsement of Edward M. Harrington for the position of United States District Judge for the District of Massachusetts submitted by me on behalf of the Boston Chapter of the Federal Bar Association. The Boston Chapter of the Federal Bar Association fully adheres to its previous endorsement.

In my judgment it is most unfortunate that federal judicial vacancies are not filled in a timely manner. The vacancy created by Chief Judge Caffrey taking senior status occurred over a year ago.

In any event, I have known Mr. Harrington personally since the mid-1960's at which time I tried a serious criminal case against him and found him to be tough but fair. I cannot credit, based on my own experience, the wild-eyed accounts appearing in the newspapers regarding his supposed lack of temperament.

Sincerely,

Cornelius J. Moynihan

Cornelius J. Moynihan, Jr.

CJM/ad
Enclosure

cc: Honorable Edward M. Kennedy,
United States Senator
Stephen J. Markman,
Assistant Attorney General

FBA

Federal Bar Association

Enoch O'D. Woodhouse II
President
Robert Halfyard
President-Elect
Albert H. Ross
Vice-President
Nancy McCarthy Wasserman
Vice-President
Lawrence D. Humphrey
Secretary
Emilie Athanasoulis
Treasurer
Jonathan Norris
Younger Lawyers Division

Executive Committee

Melvin Norris, 1st Circuit Vice President
Cornelius J. Moynihan, Jr.
Eleanor F. Taylor
Albert H. Ross
James B. Krasnoo
Joseph DiGiovanni
Robert J. Murphy
LTC Richard L. Farr (USAF)
James Savage III

Boston Chapter
66 Canal Street (5th Floor)
Boston, MA 02114
Tel: (617) 227-7460

January 21, 1987

Stephen J. Markman, Esquire
Assistant Attorney General
Office of Legal Policy - Room 4234
U. S. Department of Justice
Washington, D.C. 20530

Dear Mr. Markman:

The Federal Judicial Selection Committee of the Boston Chapter of the Federal Bar Association believes that of the candidates for the current vacancy on the U.S. District Court for the District of Massachusetts, Edward M. Harrington is very well qualified by his professional background in law enforcement and trial practice.

Sincerely,

Cornelius J. Moynihan, Jr.
Chairman of the Judicial
Appointments Committee
Boston Chapter
Federal Bar Association

CJM/ad

MBA
Massachusetts Bar Association

20 WEST STREET
BOSTON, MASSACHUSETTS 02111-1204
(617) 542-3602

November 24, 1987

Senator Patrick J. Leahy
Senate Judiciary Committee
Roomm 224
Dicksen Senate Office Building
Washington, D.C. 20510

Re: Attorney Edward F. Harrington

Dear Senator Leahy:

I have known Attorney Edward F. Harrington as a friend and colleague for over 20 years. I got to know and respect Ted Harrington when we served together in the United States Attorney's Office in Boston as Assistant United States Attorneys from 1965 to 1968. I found Ted Harrington to be of exceptionally high character and outstanding legal ability. I have known him to be thoughtful, considerate and fair. He has a great sense of humor and he has common sense in abundance.

Ted Harrington is well qualified by experience, temperment, intellect and character to serve as a Judge on the United States District Court for the District of Massachusetts. I respectfully recommend him to you without reservation.

Very truly yours,

John M. Callahan
President

JMC/kep

cc: Senator Edward M. Kennedy

Criminal Division

Organized Crime and Racketeering Section
Boston Strike Force

Post Office Box 1433
John W. McCormack
Post Office and Courthouse
Boston, Massachusetts 02109

617/223-9800

November 24, 1987

Senator Patrick J. Leahy
Senate Judiciary Committee
Room 224
Driksen Senate Office Building
Washington, D.C. 20510

Re: Edward F. Harrington

Dear Senator Leahy:

As a federal prosecutor who has worked both for and with Edward F. Harrington, I am writing in support of Mr. Harrington's nomination as a United States District Court Judge.

I could recite a number of incidents over the years which demonstrate that Mr. Harrington possesses the requisite personal and intellectual qualities to be a judge. However, rather than write a lengthy letter, I will confine myself to the period of time when Mr. Harrington was the United States Attorney for the District of Massachusetts and I was the Chief of the Political Corruption Unit in his office.

When the United States Attorney Harrington hired me to set up the political corruption investigations unit in his office, he told me that he wanted me and the other prosecutors in the unit to aggressively pursue political corruption wherever it led in Massachusetts, but to do so in a fair and even handed manner. We attempted to do this and I believe that the record will reflect that we were successful in those efforts. However, I am sure that you understand as a former prosecutor that not everyone in the political establishment in Massachusetts enthusiastically supported our efforts to unearth and prosecute corruption,

//

especially when it resulted in the prosecutions of friends or political allies.

Serving under Mr. Harrington in the Political Corruption Unit in his office provided me with unique insight into his character and abilities. Mr. Harrington wanted political corruption investigations pursued aggressively, but with due regard for reputations of those potentially involved. Having been a candidate for public office himself, he understood the damage such an investigation could inflict on a public official. On the myriad of difficult legal issues that arose during these sensitive investigations and which required difficult decisions on the appropriate legal strategy to adopt, he continually demonstrated superior analytical ability and a firm grasp of the legal principles involved. More importantly, despite the pressures that are part of such investigations and trials, he always was careful in his analysis of the facts and the applicable law in his decision making. All five of the prosecutors in the unit (three of whom are now partners in prestigious Boston law firms and one of whom is now a federal judge) quickly were impressed with Mr. Harrington's ability to grasp complicated factual and legal issues and to decide on the appropriate course of action for the government to follow. The success of the political corruption unit during Mr. Harrington's tenure as United States Attorney is testimony to his abilities as a careful and thoughtful lawyer.

There is one more issue which I alluded to earlier in this letter which I wish to address before closing. Political corruption investigations are by their very nature difficult to undertake and to bring to a successful conclusion. The targets of such investigations are many times in unique positions to fight back. More importantly, some of the targets of such investigations are known to a United States Attorney from political life, and may be political or even personal friends of the United States Attorney. Such was the case on several occasions during Mr. Harrington's tenure as United States Attorney. On every such occasion, Mr. Harrington made it clear to me and to the other prosecutors in the unit that the decision to investigate or to indict was to be made by us in the first instance and by him ultimately based only on the facts of the case and on the law; friendship or politics were never considered when such decisions were made by Mr. Harrington. Because of this, he earned the admiration of all who served under him in the United States Attorney's Office.

I urge you and other members of the Judiciary Committee and of the Senate as a whole to approve the nomination of Edward F. Harrington as a United States District Judge. The country needs judges of his character, ability and experience.

Very truly yours,

Jeremiah T. O'Sullivan
Chief Attorney

cc: Senator Edward M. Kennedy

DM:jeo

Washington, D.C. 20530

November 24, 1987

TO WHOM IT MAY CONCERN

I would like to take this opportunity to share with you my thoughts about Edward F. Harrington who has been nominated by the President to serve as a judge of the United States District Court in Boston. I first met Ted Harrington in the mid-1960's when we both were Assistant United States Attorneys in New England. In 1969, each of us joined the Boston Strike Force of the Organized Crime and Racketeering Section, and in 1970, Ted became the Attorney in Charge of that Strike Force. From 1969 until the fall of 1971 when I left New England, he was my supervisor, teacher, and colleague. He remains to this day my valued friend. When he became United States Attorney in Boston in 1977, we renewed our close professional relationship.

Based upon my 20-year relationship with him, I respectfully and without reservation state that Ted Harrington has all the qualities that the public expects, demands, and deserves in a federal judge. He has a fine intellect, a keen mind, and a well-deserved reputation for absolute integrity and honesty. He is fair and patient, yet firm. Moreover, he is diligent, modest, and a fine teacher of young lawyers. Finally, he possesses that all important attribute--a judicial temperament! In short, I am certain that he will be an outstanding judge. I would be pleased to discuss my views in detail on this subject.

Very truly yours,

David Margolis

David Margolis, Chief
Organized Crime and
Racketeering Section
Criminal Division

November 23, 1987

To Whom It May Concern:

I have known Edward F. Harrington of Massachusetts for over 18 years. As a young lawyer in the Justice Department, I was assigned to work with him in 1969 on the Boston Organized Crime Strike Force. "Ted" Harrington was a pleasure to work for and with. My recollection of him at that time was that he gave me increasing responsibility, worked with me so that I was able to meet those responsibilities, and generously gave me credit for my work. I learned from watching him use his ready sense of humor and dedication to the mission of the office how to defuse the tensions which can be so distracting in a prosecutor's office.

Several years later when I had become the Chief Attorney of the Boston Strike Force, Ted Harrington was appointed United States Attorney for the District of Massachusetts. I was impressed with the seriousness with which Ted undertook the duties of his office. His emphasis on prosecuting official corruption was an example of leadership from which federal prosecutors everywhere ought to draw inspiration. The relationship between the Strike Force and the United States Attorney's Office was never closer, largely due to Ted Harrington's desire that our offices work smoothly together.

The President has nominated Ted Harrington to be a United States District Judge for the District of Massachusetts. I am delighted with that nomination because the quality of the man will match the requirements for tnat demanding office.

Nearly two decades of knowing Ted Harrington convinces me that as a judge he would seek justice and have the ability to administer it fairly.

Sincerely yours,

Gerald E. McDowell

Gerald E. McDowell
Chief, Public Integrity Section
Criminal Division
U.S. Department of Justice

U.S. Department of Justice

Washington, D.C. 20530

STATEMENT

OF

GERALD E. McDOWELL
CHIEF
PUBLIC INTEGRITY SECTION
CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE NOMINATION OF
EDWARD F. HARRINGTON

TO BE A
UNITED STATES DISTRICT JUDGE

ON

DECEMBER 9, 1987

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to give the Committee my assessment of the ability, character and temperament of Edward F. Harrington, who has been nominated by the President to be United States District Judge for the District of Massachusetts.

I have known "Ted" Harrington since 1969, when I began to work under his supervision, as a lawyer on the Boston Organized Crime Strike Force. Later, during the time he was United States Attorney for the District of Massachusetts, I worked closely with him as the Boston Strike Force Chief Attorney in carrying out the federal government's program against organized crime.

Since I have worked closely with Ted Harrington in devising litigation strategy and preparing federal litigation, I have developed the highest respect for his courtroom skills and good judgment about the proper conduct of federal litigation.

In working both for him and with him, I was able to observe how he reacted to the most difficult problems facing a federal prosecutor, including witness protection, proper use of electronic surveillance, and the conduct of grand jury inquiries. Ted Harrington's solution to a problem was to do the "right thing" - right for his client, the United States, not only in

result, but also so that the process by which that result was achieved would be objectively viewed as just and appropriate. His work reflected his excellent character.

Finally, it was a pleasure to work for and with Ted Harrington. His temperament was the glue that held the early Boston Strike Force together. He had a clear sense of purpose and the personality to get disparate personalities to work together smoothly. He leavened his firm leadership with an engaging sense of humor. If he carries this temperament on to the bench, he will be an outstanding trial judge.

I unhesitatingly endorse the nomination of Edward F. Harrington to be a United States District Judge for the District of Massachusetts.

COOLEY, MANION, MOORE & JONES, P.C.
COUNSELLORS AT LAW
RUSSIA WHARF WEST
530 ATLANTIC AVENUE
BOSTON, MASSACHUSETTS 02210
(617) 542-3700

EARLE C. COOLEY
HARRY L. MANION III
BARBARA L. MOORE
PATRICK T. JONES
JOANNE J. BISEAU
LOUIS M. MASSERY
DANIELLE E. DEBENEDICTIS

THOMAS G. GUINEY
ANDREW W. SAVITZ
DONNA R. CORCORAN
BRIAN G. CALLAHAN
ROBERT S. MOLLOY*
ROY P. GIARRUSSO
PAUL F. BECKWITH
EDWARD C. COOLEY
ROBERT M. NORTON

KEVIN M. GLYNN
OF COUNSEL

* ALSO ADMITTED IN NEW HAMPSHIRE AND NEW YORK

January 26, 1988

FEDERAL EXPRESS

Senator Joseph Biden, Jr.
Dirksen Senate Building, Room 224
Washington, D.C. 20510

Dear Senator Biden:

Edward F. Harrington is under consideration for judicial appointment to the United States District Court for the District of Massachusetts. I respectfully oppose his nomination.

I have been a trial lawyer in Massachusetts for more than thirty years and I have seldom encountered a person less temperamentally suited to be a United States District Court Judge. It has been my experience that one disagrees with Mr. Harrington at the risk of being labelled an enemy of society. Indeed, when he failed to be recommended for a superior court appointment by Governor Dukakis' Judicial Nominating Council, of which I was a member, he attributed his failure to a political conspiracy and promptly switched his party affiliation. He publically impuned the integrity of the members of the Judicial Nominating Council.

It is true that while Mr. Harrington was United States Attorney, I successfully defended, on court appointment, a man Mr. Harrington had targeted for multiple prosecution in both federal and state courts. It is equally true that I have since supported three of the assistant prosecutors in that litigation for judicial appointment. I have done so because I respect competent and vigorous trial advocacy. It is the cornerstone of our judicial system.

There is a point, however, at which zealous advocacy ends and abuse of the criminal justice system begins. In my judgment, Mr. Harrington passed this point on a number of occasions during his career as a prosecutor. I do not refer primarily to the

pejorative labels he has applied to me and others who have disagreed with him, although his capacity to be disagreeable in the face of disagreement is certainly a relevant consideration. Rather, I emphasize his rule-or-ruin approach to law enforcement, which propelled him, in the litigation I defended, to create warfare between federal and state law enforcement agencies, inflicting wounds that will not heal for many years. I also stress my belief that he has seriously misused the Federal Witness Protection Program.

Mr. Harrington sponsored Joseph Barboza for inclusion in the Federal Witness Protection Program and he is quite proud of the convictions he obtained with the testimony of this witness. I submit that he has nothing of which to be proud. Barboza was a career criminal and a vicious killer. He was given a new identity and placed in an unsuspecting California community where he continued his criminal career. When he was arrested and prosecuted--I believe for murder--Mr. Harrington intervened in his behalf and the charge was greatly reduced. As a result, Mr. Barboza made it back to freedom and a life of crime in a very short period of time.

Mr. Harrington also sponsored Diane Wazen for the Federal Witness Protection Program. Wazen was a key witness in two of the prosecutions against my client. While in the program, she participated in an American Express check scam that netted more than $20,000. Mr. Harrington shielded her from prosecution until she had served his purpose and, although ultimately convicted, Mr. Harrington saw to it that she never served a day for her crime.

Thomas Sperrazza, confessed murderer of five people, including a Boston police officer, was another of Mr. Harrington's protected witnesses against my client. Sperrazza was cajoled, coddled and even promised ultimate release in return for his testimony.

The legitimate function of the Federal Witness Protection Program is to keep threatened witnesses safe and secure so that they will be available to give truthful testimony. It should not be used as a vehicle to reward witnesses for whom perjury is the least offensive crime in their repertoire, nor as a safe haven for continued criminal activity. In my view, Mr. Harrington demonstrated a remarkable insensitivity to the

COOLEY, MANION, MOORE & JONES, P.C.

threat which his protected witnesses presented to the integrity of the judicial process.

I understand that Alice E. Richmond and Richard K. Donahue have given your Committee their reasons for opposing Mr. Harrington's nomination. I am aware of the experiences they have had with Mr. Harrington and I believe that those experiences, combined with my own, warrant the conclusion that Mr. Harrington is volatile, vindictive and intemperate when he doesn't get his way or somehow feels invalidated. In my opinion, he lacks the judicial temperament essential to the even-handed administration of justice in our federal courts.

Respectfully yours,

Earle C. Cooley

ECC:ndj

Women's Bar Association of Massachusetts
121 Mount Vernon Street, Second Floor
Boston, Massachusetts 02108
617-227-0986

January 25, 1988

VIA FEDERAL EXPRESS

Senator Joseph R. Biden, Jr.,
Chairman
United States Senate Judiciary Committee
Russell Building, Room 489
Washington, D.C. 20510-0802

Dear Mr. Chairman:

The Women's Bar Association of Massachusetts is firmly committed to promoting the interests of women and women lawyers in the Commonwealth of Massachusetts. To that end, we have strongly advocated the inclusion of women in both the selection process and as applicants for positions in both the state and federal judiciary.

Recently we initiated the Massachusetts Supreme Judicial Court's Gender Bias Study to examine the extent of, and provide remedies for, gender bias in the Massachusetts Courts.

It is therefore with deep dismay that we reviewed the testimony of Alice Richmond before the Senate Judiciary Committee on December 9, 1987 regarding the nomination of Edward Harrington for the United States District Court for the District of Massachusetts. The overtly sexual, hostile epithets used publicly by Mr. Harrington towards Ms. Richmond and other women attorneys in the Commonwealth reflect a gender bias that we are striving to eradicate, not promote, in this Commonwealth. A comparable epithet with racial or religious overtones made to a member of the bar would not be tolerated. Candidates for the federal bench must demonstrate the highest sensitivity to gender, racial and religious issues.

Because Mr. Harrington has not only failed to demonstrate such sensitivity, but also has displayed the overt hostility noted above, the Women's Bar Association of Massachusetts opposes his nomination for a position as a federal district judge and hereby requests that the record reflect our opposition.

Very truly yours,

S. Beville May
President-Elect

cc: Senator Edward M. Kennedy
Senator John F. Kerry
Edward F. Harrington

MWPC
Massachusetts Women's Political Caucus
145 Tremont Street ■ Boston, MA 02111 ■ (617) 451-9294

January 11, 1988

Senator Joseph Biden
Chairman
Senate Judiciary Committee
Room 224 Senate Dirkson Building
Washington, D. C. 20510-6275

Dear Senator Biden:

I am writing to express our opposition to the pending federal judgeship of Edward Harrington of Massachusetts.

The Massachusetts Women's Political Caucus is a statewide multi-partisan organization committed to electing and promoting women to elected and appointed office and ensuring equal rights and equal access for all. Mr Harrington has never been an ally to these concerns and, in fact, in his most recent bid in 1986 for Attorney General we worked hard to defeat him for these reasons.

While his previous record is important for the Senate Judiciary Committee, there is additional information which I feel your committee should be aware of. Recently, Mr. Harrington verbally attacked several prominent women attorneys in Massachusetts. These attacks were vicious, vulgar and very unprofessional. Mr. Harrington's personal attack on their integrity as attorneys and his use of obscene language in those attacks is conduct which we find unacceptable.

Mr. Harrington has once again demonstrated a lack of regard and respect for women. This lack of regard, seriously calls into question his ability to be a fair and reasonable judge. We urge you to reject his appointment.

Sincerely,

Leslie K. Peterson
President

cc: Federation of Women Attorneys
National Women's Political Caucus
Senator Edward Kennedy

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN
EDWARD M. KENNEDY, MASSACHUSETTS
ROBERT C. BYRD, WEST VIRGINIA
HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZONA
PATRICK J. LEAHY, VERMONT
HOWELL HEFLIN, ALABAMA
PAUL SIMON, ILLINOIS
STROM THURMOND, SOUTH CAROLINA
ORRIN G. HATCH, UTAH
ALAN K. SIMPSON, WYOMING
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
GORDON J. HUMPHREY, NEW HAMPSHIRE
MARK H. GITENSTEIN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
TERRY L. WOOTEN, MINORITY CHIEF COUNSEL
R.J. DUKE SHORT, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 12, 1988

Edward F. Harrington
Sheridan, Garrahan & Lander
161 Worcester Road
Framingham, Massachusetts 01701

Dear Mr. Harrington:

Since the date of the second hearing on your nomination, a number of additional questions have been raised to which the Judiciary Committee would like to have your responses. In order to enable the committee to complete its review of your nomination as soon as possible, I would appreciate if you would submit written answers to the enclosed additional questions.

Thank you for your cooperation.

Sincerely,

Joseph R. Biden, Jr.
Chairman

cc: Honorable Strom Thurmond
Honorable John Bolton

ADDITIONAL QUESTIONS FOR EDWARD F. HARRINGTON

1. The committee received a letter from attorney Stephen Delinsky, a copy of which is enclosed, raising concerns about a number of actions taken by you. Please explain the circumstances of your actions in responding to the following charges made by Mr. Delinsky:

   a. That as a result of prosecutorial actions taken by you as U.S. Attorney, cooperation deteriorated between federal and state law enforcement officials in Massachusetts. (In responding to this charge, it would also be helpful if you would address yourself to the events described in the enclosed column from the Boston Globe dated June 14, 1981 and the enclosed column from the Boston Herald dated September 26, 1986.)

   b. That after the Judicial Nominating Council turned down your application for a state judgeship, you publically and privately berated Mr. Delinksy for his role in the nominating process, using extremely harsh language.

2. According to a report that appeared in the Boston Phoenix in June of 1981, a copy of which is enclosed, you used crude language to describe U.S. District Judge Joseph Tauro after Judge Tauro declared a mistrial in a hotly contested public corruption case that your office had been prosecuting. Please explain the circumstances of your remarks in that situation, and respond to the following additional charges made in the article:

   a. That you were well aware of a potential conflict of interest between Judge Tauro and the defendant in the case long before the case went to trial, but waited until after the mistrial in the case to move for recusal.

   b. That you provided information to the press about the potential conflict of interest between Judge Tauro and the defendant and then later premised your motion to recuse the judge in part on the fact that the judge's impartiality "has been questioned in the public media."

3. In March of 1977, several years after your service as Chief of the Organized Crime Strike Force in Boston, you appeared in court with attorney Albert ~~Gioffi at a hearing~~ on reduction of sentence for a criminal defendant named Louis Catania. Catania

believed that he had received a stiff sentence because of allegations that he was involved with organized crime. According to a transcript of the hearing, a portion of which is enclosed, Mr. Cioffi reported to the Court that you had checked with sources in the Organized Crime Strike Force and found that there was no indication that Mr. Catania had ties to organized crime. This transcript raises a number of questions:

a. Was the information you obtained from the Organized Crime Strike Force about Mr. Catania confidential information or derived from confidential information? If so, was it appropriate for you to disclose the information?

b. Did you or your firm receive a fee for your appearance in this action?

c. Did you ever receive a fee on any other occasion to provide representation or testimony concerning an individual's links to organized crime? If so, please describe the circumstances.

d. When you were U.S. Attorney or Chief of the Organized Crime Strike Force, did you ever provide information to a private attorney concerning an individual's links to organized crime? If so, please describe the circumstances.

FINE & AMBROGNE
COUNSELORS AT LAW

Exchange Place, Boston 02109
(617) 367-0100
TELECOPIER: (617) 227-0277
TELEX: 298068
CABLE ADDRESS: "WHITEACRE" BOSTON

WASHINGTON OFFICE
WHITE, FINE & VERVILLE
1156 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 659-2900

PHIL DAVID FINE
PETER VAN
RALPH I. FINE
ANNA M. DIGENIO
ROBERT F. SYLVIA
ARNOLD M. ZAFF
GENE A. BLUMENREICH
FREDERICK J. PITTARO
CHRISTOPHER H. MILTON
STEPHEN R. DELINSKY
ROBERT L. NEBBEN
ROBERT L. CAPORALE
CATHLEEN DOUGLAS STONE
NANCY L. CORLIN
RODERICK MACLEISH, JR.
STUART A. OFFNER
JULIA LIVINGSTON BELL
STEPHEN T. LANGER

SUSAN H. ALEXANDER
DANIEL C. COHN
MURRAY L. SACKMAN
ANTHONY M. MOCCIA
MICHAEL B. ROTMAN
MARC D. SCHERR
TREAZURE R. JOHNSON
LYNNA E. JACOB
SUSAN B. TUCHMAN
JUDITH B. MILLER
MELINDA L. REINGOLD
BETSY L. WOLF
THOMAS C. ARMSTRONG
GINA B. DAILEY
BRUCE E. ROSOFF
MARY LEE MOORE
PAUL J. LEVENSON

JOHN J. ELLIS
KENNETH S. FEDERMAN
M. CHRYSA LONG
PETER M. PALLADINO
LEJOB FOGELMAN
DAVID F. SLOTT, JR.
DAVID E. DRYER
LAWRENCE A. PLETTER
AMANDA DARWIN
JENNIFER W. CATLIN
MELA LEW
NEAL J. REYNOLDS
HENRY M. ROBEN
JAMES M. KENNEDY
MICHAEL D. ASSAF
RICHARD J. LANDAU

OF COUNSEL

ALAN L. FELD
JAMES R. HOPKINS
GILBERT P. VERBIT

December 23, 1987

FEDERAL EXPRESS

Senator Joseph R. Biden, Jr.
Chairman, Commitee on the Judiciary
United States Senate
Dirksen Senate Office Building
Washington, DC 20510-6275

Re: Nomination of Edward F. Harrington

Dear Senator Biden:

I thank you for your invitation dated December 3, 1987 to provide testimony before the Judiciary Committee concerning the nomination of Edward F. Harrington to be a United States District Judge for the District of Massachusetts. I was unable to attend the hearing on December 9, 1987 because I had to attend a court hearing on behalf of a client. I very much wanted to testify before the Committee, consequently, I am writing this letter to state my serious concerns about the judicial temperament of the nominee.

I have been a trial lawyer for 17 years. I was a state prosecutor for ten years, serving four years as an Assistant District Attorney in Suffolk County and six years as an Assistant Attorney General and Chief of the Criminal Bureau in the Massachusetts Department of the Attorney General. I was Chief of the Criminal Bureau during the time that the nominee served as the United States Attorney for Massachusetts. As a result of Mr. Harrington's actions, cooperation between federal and state law enforcement officials reached an all-time low. In a state that heretofore had a remarkable record of cooperation between federal and state law enforcement officials, Mr. Harrington in a short time destroyed that cooperation. I congratulate his

successor, William Weld, for his efforts in restoring the established tradition of cooperation.

After I left public service in December, 1982 I was appointed by Governor Dukakis in March, 1983 as a member of the State Judicial Nominating Council. During my membership, the Council considered the application of Mr. Harrington for the position as Justice of the Superior Court. As you probably know, the Judicial Nominating Council did not recommend Mr. Harrington to be a Superior Court Judge. After his rejection, Mr. Harrington called my law office, berated me through the use of obscenities and demanded that I resign from the Council because I did not support his application.

Thereafter, I witnessed two public displays of Mr. Harrington's intemperate conduct. On one occasion, when I was waiting in line to be served in a crowded public restaurant in Boston, Mr. Harrington, in front of a large luncheon group of people, yelled at me "Why did you f--- me?" At the time Mr. Harrington appeared visibly upset and out of control of his emotions. I told Mr. Harrington that his comments were inappropriate and walked away.

Within a few months of this incident, I was walking on a busy downtown Boston street one day when I saw Mr. Harrington walking across the street toward me. Mr. Harrington yelled loudly at me from across the street "Why did you f--- me?" I observed that nearby pedestrians looked around in amazement. I did not respond to Mr. Harrington's statement and continued to walk away from him in the opposite direction.

As an active trial lawyer I know that the temperament of a judge is crucial to his ability to administer justice fairly. I do not believe that Mr. Harrington has sufficient control over his emotions to enable him to be a fair judge.

I hope this letter will be helpful to the Committee in considering Mr. Harrington's nomination. If you or any other

FINE & AMBROGNE

Senator has any questions about the facts contained herein I would be more than happy to answer them.

Very truly yours,

Stephen R. Delinsky

SRD/emt
cc: Senator Edward M. Kennedy
Senator John F. Kerry
Andrew Rainer, Esq.

State-Federal Feud Hurts Crime-Fighting Efforts

(By David Farrell)

Relations among several leading state and federal law enforcement officials have deteriorated to the point where cooperation among them is virtually non-existent. The split is so severe that it will take a summit conference of all principals to heal the deep wounds that are undermining law enforcement in Massachusetts.

The breakdown has reached the point where communications between the office of US Atty. Edward F. Harrington Jr. and Atty. Gen Francis X Bellotti have ceased. The animosity has spread to other officials in various criminal justice jurisdictions, including the FBI, State Police, Boston Police and several district attorneys.

The alarming situation was noted at the June conference of the county prosecutors on Cape Cod last week and resulted in a preliminary suggestion by the DAs to create a subcommittee to lay the ground work for peace meetings with federal officials.

There is now such an undercurrent of cross-criticisms and accusations that it is difficult to precisely pinpoint when or how the big slide began.

When Brian Bruh left his post as head of Internal Revenue's criminal investigation bureau here last year to become assistant inspector general of the US, all seemed well. In attendance at his farewell party was nearly every important law enforcement official in Massachusetts. Harrington, Bellotti, Larry Sarhatt, the FBI's new chief here, et al appeared to hit it off well during the get-together.

But trouble was brewing beneath the surface. The federal trial of a former inspector in Bellotti's consumer protection office had left a strain on the relationship between the attorney general and the US attorney.

During the trial three months earlier, Asst. US Atty. Lloyd Macdonald characterized Atty. Thomas Kiley, Bellotti's outstanding first assistant, as the Haldemann-Ehrlichman of Bellotti's office. The implication, of course, was that the attorney general himself was a Richard Nixon of sorts. Macdonald, who is occasionally given to less than judicious remarks, was criticizing the way Bellotti's office had handled the case of Richard Paul, one-time inspector in the attorney general's office, by firing, not indicting him.

Bellotti was wild and blamed Harrington, who backs his men totally and made no effort to repudiate Macdonald's questionable characterization.

Last fall, when Macdonald began making inquiries for Scott Harshbarger's old job as chief counsel to the State Ethics Commission, there was a line of individuals, headed by Bellotti, waiting for him. The attorney general went out of his way to see to it that Macdonald did not get Harshbarger's berth.

Macdonald, who has gained a reputation as an over-zealous prosecutor, in turn dispatched a message to the attorney general that he had little use for him. This was conveyed through a media representative who covers the federal courts now and then.

Macdonald's aggressive tactics, which have made him the darling of FBI and IRS agents who pursue white-collar crime, have alienated other politicians, the most notable of whom is former Gov. Francis W. Sargent. At the start of the recent trial of former Sen. James A. Kelly Jr. of Oxford, Macdonald indicated that he wanted to call the ex-governor to testify at the trial about Sargent's handling of legislative leaders.

Unknown to Macdonald at the time, Sargent was experiencing severe chest pains and was slated to enter the hospital for a coronary bypass. When the former chief executive's lawyer asked Macdonald to excuse Sargent, Macdonald wouldn't hear of it. He then called Sargent's doctor to question him about the gravity of his heart problem.

When the doctor told Macdonald that it was serious, Macdonald responded, according to Sargent, by saying that "that's the excuse big gangsters use." A few days later, Sargent entered the Brigham and Women's Hospital for the serious bypass surgery. The operation didn't take well, and the former governor recently had to have the coronary operation performed once again.

Relations between federal and state law enforcement people grew cooler still after the Paul trial, when the FBI intensified its probe of Myles Connor, an informant for Norfolk County Dist. Atty. William D. Delahunt and State Police Maj. John Regan's organized crime unit.

Connor was convicted of complicity in the murder of two girls whose bodies he had helped Delahunt's office find several years ago. After Connor's trial concluded this spring, US Atty. Harrington needled Bellotti by asking his office to probe the

possibility that Dist. Atty. Delahunt might have known that Connor was involved in the murders at the time Connor led him to the corpses.

Bellotti, who is a political ally of Delahunt, jabbed back at the federal prosecutor and asked him to clarify his request. To that, Harrington told the attorney general to do what "you term appropriate." Now it was open war.

Delahunt was wild, and he immediately went to the Mass. Board of Bar Overseers and asked the board which oversees the conduct of lawyers, to discipline the US attorney for his unprofessional conduct. The Norfolk prosecutor charged that Harrington was impugning his office in the media, used poor judgment and abused his own federal office by engaging in public conduct involving such misrepresentations.

Delahunt went to Washington last Monday to push his complaints aboaut Harrington on the federal level with Michael Shaheen, chief counsel for the Justice Dept.'s Office of Professional Responsibility.

Harrington has responded by vigorously denying all charges and any unprofessionalism on his part.

In recent weeks, the chasm broadened when Harrington applied to Gov. Edward J. King's Judicial Nominating Commission for a Superior Court vacancy. His application touched off a battle within the JNC as Bellotti and others moved to block it. Although the federal prosecutor got through the judicial panel, the running battle continued, and, in the end, Gov. King responded to the adverse criticism and bypassed the controversial official by choosing another individual for the trial court vacancy.

Meanwhile on another front, Atty. Gen. Bellotti scuttled the appointment of former FBI agent Robert Sheehan as state inspector general. Bellotti has told colleagues of reports he received quoting an FBI agent as saying that "we'll go after Bellotti once we get Sheehan in as inspector general." Although the idea that Sheehan would compromise the IG office in such fashion is preposterous, the reports made a dent on Bellotti and helped thwart Sheehan's bid to be the state's new watchdog.

Unless a meeting of all the feuding principals takes place soon, such wrangling and bickering, so detrimental to their common goal, will continue. Perhaps such a session should take place next month when a new federal prosecutor is confirmed for the slot held by Harrington over the past four years.

(120)

DAs go for Shannon over Ted Harrington

PETER LUCAS | A GOP prosecutor wavering

EDGARTOWN — Paul Rollins the Republican district attorney for the Cape and Islands District is really agitating when he is urging former U.S. Rep. James Shannon, a Democrat, over Republican Edward F. Harrington for the office of attorney general.

Should Rollins a Rollins will join with the 10 other district attorneys — all Democrats, in supporting Shannon over Harrington for the sensitive office of attorney general, an office that has a direct relationship with the district attorneys.

Shannon did himself and his campaign a lot of good when he attended the three-day annual conference of the Massachusetts District Attorneys Association this week at the invitation of Bristol County District Attorney Ron Pina, president of the organization. Shannon not only campaigned among the district attorneys and their assistants, but he also had the opportunity to speak with Rollins and ask for his endorsement. Harrington, a former U.S. attorney, was not invited to the gathering at Martha's Vineyard.

Like his Democratic counterparts, Rollins is concerned that the fine working relationship that the district attorneys have developed with outgoing Attorney General Frank Bellotti for the last 12 years will be in jeopardy if Harrington is elected. Harrington, who has a reputation for being confrontational, was constantly feuding and fighting turf wars with Bellotti and with the district attorneys when he was U.S. attorney.

Those feuds ended when Republican William Weld became U.S. attorney in 1981. Weld, a former GOP candidate for attorney general in 1978, and Bellotti hit it off and worked hand in glove on various investigations that concerned both the federal and state governments. Weld is now a high ranking official of the Justice Department in Washington.

If nothing else Bellotti, who was honored at a conference luncheon by the district attorneys and Supreme Judicial Court Chief Justice Edward F. Hennessey, was able to work closely with the district attorneys and the U.S. attorney's office.

Prior to Bellotti's first term as attorney general, there was little, if any, cooperation between the district attorneys and the attorney general's office, let alone the U.S. Attorney's Office.

Bellotti, as in his philosophical best, was able to cooperate with the district attorneys and approach criminal problems with a cooperative rather than confrontational approach. He used the same technique with the nation's other 49 attorneys general beginning in 1975 when, upon taking office, he had several dates join with him when he filed suit against the federal government over the issue of drilling off the Northeast Coast.

Bellotti and the other district attorneys believe that cooperative approach would be destroyed should Shannon not be elected, which is why he and the district attorneys are supporting Shannon over Harrington, a former Democrat turned Republican Bellotti simply believes that Harrington does not have the necessary temperament, emotional balance or the right kind of broad political experience to do the job, which may account for his quick position switches on various issues. Others agree.

Said Bellotti of Harrington, "He was a disaster with the district attorneys when he was U.S attorney. His experience is very narrow. Shannon has a broader view of the office. The attorney general prosecutes cases, but he does more than that. He provides leadership. If you're just trying cases, you're not doing your job."

Pina said, "We'll all miss Frank Bellotti, of course, but

> "Harrington, to put it mildly, does not have too many friends among the district attorneys, the very people who have dealt with him in the past. And if Rollins goes with Shannon, he will have none."

having dealt with Ted Harrington I would anticipate that the district attorneys will endorse Jim Shannon."

Essex County District Attorney Kevin Burke said, "Harrington is a one dimensional candidate. He seems to focus just on crime. There is much more to the job than crime. Rather than complimenting the district attorneys he sees his role as a confrontational one."

Asked if he thought Harrington could work with the district attorneys, Middlesex County District Attorney Scott Harshbarger said, "Never." Harshbarger, a former assistant attorney general under Bellotti, and, briefly, a candidate for Bellotti's job, said 12 years ago there was divisiveness among law enforcement agencies, but that Bellotti brought everyone together. "Now it's taken for granted," Harshbarger said.

Asked the same question, Norfolk County District Attorney William Delahunt said, "There would be absolutely no cooperation, none. Law enforcement came to a stop when he was U.S attorney."

Harrington, to put it mildly, does not have too many friends among the district attorneys, the very people who have dealt with him in the past. And if Rollins goes with Shannon, he will have none.

Peter Lucas's column appears Sunday, Wednesday and Friday.

Shannon cleans up

PETER LUCAS | Harrington loses two debates

THE script called for Republican attorney general candidate Edward Harrington to blow away U.S. Rep. James Shannon out of the water once they met one on one in debate. But it has not worked out that way.

In their two face to face meetings to date — at Northeastern University two weeks ago and on Channel 56's "Point of View" Sunday night — Shannon, who is supposed to lack prosecutorial experience, turned the tables on Harrington, a former Democrat and former U.S. attorney, and blew Harrington's doors off.

At Northeastern, when Harrington attempted to bring the now-jailed name of Shannon's energizing political action committee money when he ran for the U.S. Senate, Shannon counter-attacked with his own list of of political action committee donations made to Harrington.

In fact, Shannon caught Harrington red handed after the GOP candidate had learned only the State Police political action committee had contributed to his campaign.

Harrington, a former Democrat turned Republican, had predicted that once the two met in debate he would show Shannon to be too inexperienced to be elected attorney general. Instead it has been Shannon who has had Harrington on the defensive, and cleaning his clock in the process.

Harrington, as self-righteous and aggressive a politician as you will come across, for years has gone around questioning the motives and integrity of others, like Gov. Michael Dukakis, Attorney General Frank Bellotti, and Norfolk County District Attorney William Delahunt, while painting himself as the non-compromising, tough prosecutor.

It has not been a bad stance for Harrington. But if you are going to run a negative campaign, as Harrington and the other Republican candidates have done in this campaign, then you had best make sure that all of the political baggage you carry has been sent to the cleaners.

Harrington launched his latest attack on Shannon during the Channel 56 debate Sunday night when he brought up a Globe Magazine story that had Shannon allegedly advising a friend how to skirt campaign finance laws. Shannon this time did not take the Harrington attack lightly. "Let me say this," Shannon said. "I have been campaigning for attorney general for the last eight months. During that eight months I haven't questioned your integrity. I impugned your integrity. I have heard you make allegations of abuse of power against Attorney General Bellotti, I've heard you accuse Governor Dukakis ..."

Harrington: "I'm not making accusations about you. I just gave you the opportunity ..."

Shannon then lowered the boom. "I've heard you accuse Governor Dukakis of a cover-up." Shannon said in relation to the Department of Revenue scandal four years ago. "I want you to tell me, Mr. Prosecutor, why it was that when you, were the U.S. attorney, where [illegible] a deputy U.S. marshal — admittedly by your own words — stealing funds, you didn't prosecute him. What you did was let him

SHANNON
On the offense

retire on a disability pension to Cape Cod where he got a job off the taxpayers for the rest of his life. I've had enough of this question of power unpugning people's integrity during the course of this campaign."

Instead of answering the question directly, Harrington, as is his custom, launched a personal attack on Shannon. "Jim, one who has the audacity to seek the attorney general's office after actually practicing law for less than two years, never trying a case, never conducting an investigation, have displayed again your lack of understanding of the prosecutor's role. What you have referred to as a deputy marshal who pilfered [illegible]."

Turning prosecutor Shannon asked, "Was he prosecuted?"

Harrington said the theft was not in excess of federal guidelines calling for prosecution, and the man was a federal employee.

Shannon: "Did you think he stole the money?"

Harrington: "[illegible]"

Shannon: "Yes."

Harrington: "Yes, he did."

Shannon: "And did you let him retire on a disability pension and live off the taxpayers for the rest of his [illegible]."

Harrington: "I had nothing to do with it."

Shannon: "Well, Ted, you're always talking about abuse of the public trust on the part of everybody, the governor, Frank Bellotti and I really question whether the people of the commonwealth want to have an attorney general who has such an unbalanced perception of what justice is and what the public trust is all about."

Harrington: [illegible] that Shannon simply did not understand the office of U.S. attorney and that the U.S. Marshal was not under the jurisdiction even though he stole the money.

The fact of the matter is that Harrington, who never has passed the state bar to be an attorney general or to be a district attorney happens to be because he never tried a case and was unable to afford to attend [illegible] for attorney general, [illegible] afford to attend [illegible] script.

Peter Lucas's column appears Sunday, Wednesday and Friday.

APPENDIX D—Continued

But there is no evidence in the memory of my mind or in Harrington's long motion for disqualification, filed after an FBI investigation, that Kelly and Tauro ever met or talked with one another during that period.

Some people connected with this case believe that Harrington filed his motion against Tauro to muddy up the hearing into prosecutional misconduct, the hearing into the charge that the U. S. Attorney's office may have knowingly used "perjured and false" testimony. Others believe that it is just sour grapes.

Harrington, who is shortly to be replaced by a Republican, expected to go out of office with a bang with the Kelly conviction, and perhaps become the Superior Court judge he wanted to become. But he failed to convict Kelly. Gov. Edward J. King gave the judgeship to someone else. He must now face a hearing on the manner in which he directed the prosecution of Kelly, and he will be out of a job in a couple of weeks.

He is leaving office with a bang, but it may not be quite the noise he expected.

Peter Lucas' column appears Sunday, Wednesday and Friday.

APPENDIX E

Boston Phoenix, June 9, 1981

Out on maneuvers: Harrington tries to move Tauro out of the Kelly case

by Charles P. Pierce

When the extortion trial of former state Senator James A. Kelly Jr. ended in a mistrial, on April 30, hardly anyone involved was pleased. With the jury deadlocked at 11-1 to convict him, Kelly knew that he was a lot closer to a trip upriver than he'd anticipated. U.S. Attorney Edward F. Harrington, on the other hand, was furious at Judge Joseph Tauro for declaring a mistrial after the jury had deliberated only 11 hours.

Perhaps the only people even marginally happy with the situation were the reporters who had listened to the case for some 25 days. Of course, they had been denied a definitive conclusion, but there were compensations. After all, you can cover politics and the law for a long time before you hear a US attorney refer loudly to a sitting federal judge as a "fucking prick" in the corridors of a federal courthouse.

Harrington's impolitic explosion last April was the emotional equivalent of the maneuverings he began last week in Tauro's court. Harrington asked that a scheduled June 9 hearing into a defense motion to acquit Kelly be postponed until June 16, claiming he needed the delay in order to prepare a motion of his own. That motion would ask for "disqualification of the trial judge whose impartiality ... has been questioned in the public media." Like many elements of the government's oft-comic pursuit of Kelly, this latest move is touched with no little absurdity.

The flap concerns 1966 legislative hearings into charges of contract-selling within the administration of Governor John Volpe. Kelly, then a freshman senator, chaired the investigations committee. Tauro was Volpe's chief counsel. It is alleged that Kelly agreed to withhold the committee's report until after that year's gubernatorial election, so as not to damage Volpe's campaign. (It should be noted that the strategy apparently didn't work. Committee Democrats leaked the report, Volpe won big anyway, and no prosecutions were forthcoming.)

Harrington's motion came on the heels of a column by David Wilson in the June 1 *Globe*. In his column, Wilson discussed the 1966 hearings, painted Tauro as Volpe's liaison with Kelly's committee, and implied that Tauro's handling of Kelly's case was a form of returning the favor. "Reward your friends and punish your enemies," read Wilson's lead. "A favor deserves a favor."

Both dailies jumped on the issue. The *Herald* noted that its own Peter Lucas had raised similar questions on May 20, and that Lucas's column must have been the one that perked up Harrington's ears. The *Globe*, on the other hand, said that Harrington "was apparently referring" to Wilson's column.

APPENDIX E—Continued

Harrington, who refused to comment on his motion, must have loved watching the dailies scramble. It so obviously suited his purpose, that purpose being to put enough public heat on Tauro that the judge will feel obligated to remove himself from the case. Given the choice, Harrington would rather try this case before Torquemada than Joseph Tauro. Cynical types have already begun to point out that the Wilson column was immediately followed up by a motion based largely on its contents and proposed by a US attorney who has had a career of playing the press like eight kinds of violin. "I think he's afraid of losing that second trial," said one State House veteran. "Above all, he doesn't want another trial before Tauro."

Harrington has very good reason to feel this way. Tauro continually riddled Assistant US Attorney D. Lloyd Macdonald during the first trial, often with extraordinarily blunt reprimands. The question now turns on Tauro's motivation. There are clearly more compelling reasons for the judge's behavior than some 15-year-old State House dealings.

In brief, the case that the US brought against James Kelly was a botched hodgepodge. That the government came so close to winning owes more to the presumption of guilt against indicted politicians than to any sort of prosecutorial expertise. All the crucial witnesses appeared under grants of immunity. The case was vitally dependent upon the testimony of noted fixers William and Frank Masiello, from whom Kelly is alleged to have extorted money. Both men have told so many stories so often that they are walking examples of reasonable doubt.

Further, Macdonald's performance was a debacle. He often got so tangled up in himself that Tauro took the opportunity to ask the prosecutor's questions for him, which rings somewhat ironic in the light of Harrington's recent motion.

And Tauro has a reputation among lawyers as being a "defendant's judge," a reputation he developed long before Kelly appeared before him. "Prosecutors," one source familiar with the judge said, "hate the guy."

In the course of the trial, the prosecutors were most clearly displeased with Tauro's frequent reprimanding of Macdonald, his charge to the jury (which said, in essence, that convicting Kelly required that the jurors believe both *les freres* Masiello, and his declaration of a mistrial. Comes now the US attorney to attribute a motive to these actions.

Harrington's motion resembles nothing more than a ploy typical of a desperate defense attorney. When your case is hit below the waterline, fire a broadside at the judge. There is little indication that Harrington will be any more successful at it than his brothers in court have been in the past. "Tauro will not take himself out," opined a prominent attorney familiar with such cases. "That's indicated by the way he's going to handle it. He's not going to soft-pedal it; he's going to hear it in open court. He's not going to have his name sullied in open court, or in the *Boston Globe*. Harrington's going to have to come up with chapter and verse. What's he going to do? Introduce Wilson's column?"

Moreover, in this state, if all judges who had at one time crossed paths with pols involved in cases before them disqualified themselves, half the benches in the Commonwealth would be empty. Take, for example, Tauro's colleague on the federal bench, Walter Jay Skinner.

Skinner was counsel to the legislature's crime commission in 1962. Later, Governor Francis Sargent twice nominated him to the state bench, only to have the Executive Council veto the idea. While serving with the crime commission, Skinner had helped pursue (or persecute, depending on how deeply your ox had been gored) friends of said executive councilors. This rejection, in fact, made Skinner available for a federal judgeship. In that capacity, Skinner presided over the 1977 extortion trial of state Senators Joseph DiCarlo and Ronald McKenzie. Does this mean that Skinner was repaying Frank Sargent when he rebuffed efforts by the two senators to explore whether the MBM affair went beyond them

APPENDIX E—Continued

(as we now know it did), to top figures within the Sargent administration (as we now know it did)? "Where was Harrington then?" asked a prominent defense attorney.

Even Harrington's stated rationale for asking Tauro to bail out is badly flawed. The motion clearly implies that the recent speculation was the catalyst, and that Harrington's doubts concerning Tauro's impartiality have been prompted by "revelations" in the media. This is utter hogwash.

Is it plausible to believe that Harrington conducted one of the most significant probes into political corruption in the history of the Commonwealth, spent three years and countless public moneys to bring Kelly to trial, and didn't know until last week that his defendant and the presiding judge had at one time had political dealings? If it is plausible, then Harrington either has a lousy memory or is a damned poor excuse for a prosecutor.

If it is not plausible, and if Harrington knew all along that Kelly and Tauro had had such dealings, then he clearly overrated his case and his prosecutor if he thought those dealings might not matter. Because for all the bitching that's come out of the US attorney's office about how Tauro handled the trial, none has dealt with the central issue: that, assuming the wildest conspiracy story is true and Tauro was inclined to give Kelly every break possible, the raggedy nature of the case, as well as Macdonald's fumblemouth, gave the judge every opportunity to do so.

Harrington's status as lame duck has given rise to speculation that this motion may just be one final volley before he retires. He clearly realizes that the scorecards of the various prosecutors in the great corruption sweepstakes launched by the MBM affair are not impressive. Kelly's is the only major scalp left, particularly now that Harrington has given up his pursuit of former Lieutenant Governor Donald Dwight, now a newspaper publisher in Minneapolis. Bill Masiello told the Ward Commission that he had paid Dwight off in the State House. Dwight now says that he is glad that Harrington has absolved him of charges brought by a "confirmed liar," the same confirmed liar whose dubious probity is central to the case against James Kelly. To lose Kelly is to lose, effectively, the whole ballgame.

Shakespeare reminded us that nothing holds fashion save war and lechery, although he would have tacked politics onto the list if he had written in Massachusetts. Everything is political, including, at bottom, Edward Harrington's motion; it is the judicial equivalent of jockeying a bill between legislative committees in order to bring it before a more sympathetic chairman. For Harrington to pretend otherwise is at best duplicitous.

For him to pretend otherwise is for him to ask us to accept him, the FBI, and several other investigatory apparatuses as underdogs. It is for him to ask us to believe that this whole affair came to his attention only last week, difficult to accept from someone who has always cultivated his contacts throughout Massachusetts politics. And it is for him to ask us to believe that his case was unfairly assailed by a judge who has waited patiently for 15 years to pay off a relatively minor debt.

There ought to be a statute of limitations on this sort of thing.

David K. DUNAWAY, Plaintiff,

v.

William H. WEBSTER, et al., Defendants.

No. C-77-0907 RFP.

United States District Court, N. D. California.

July 9, 1981.

In a suit under the Freedom of Information Act, the District Court, Peckham,

ESSEX, ss. SUPERIOR COURT
NOS. 88118 & 9

COMMONWEALTH

VS

LOUIS J. CATANIA

APPEARANCES: Philip Sorkin, Assistant District Attorney, Essex County, Lawrence, Massachusetts, appearing for the Commonwealth.

Paul Markham, Esq., 84 State Street, Boston, Massachusetts, appearing for the defendant.

Albert Cioffi, Esq., 8 Chelsea Street, Everett, Massachusetts, appearing for the defendant.

BEFORE: JOHNSON, J.
(A District Court Judge sitting in Superior Court)
Special Session
Essex Superior Court
Lawrence, Massachusetts
Wednesday, February 16, 1977

Eva Taper
Official Court Reporter
Massachusetts Superior Court

MR. MARKHAM: Yes, your Honor.

THE COURT: And I left it open -- which gives you reason to come in again -- which is the third time for the same thing -- to revoke and revise.

So I didn't mind leaving it open at that time so you can come forward -- or anyone can come forward in behalf of the defendant.

MR. MARKHAM: Well, I appreciate that, your Honor.

If I may address myself again to the first --

THE COURT: Go ahead.

I'm sorry if I interrupted you. I didn't intend to. But I did want to set you straight, respectfully, on that score.

Go ahead.

MR. MARKHAM: As to the first basis for the District Attorney's recommendation, I submit that the District Attorney has absolutely no basis, in fact, for the feeling that the defendant could submit additional information.

And I've talked to Mr. Burke about this.

He said he thinks he does.

He has no concrete -- and I asked him specifically -- what concrete information do you have regarding this?

He said he had none.

The fact that a man is the recipient of a forged document, in and of itself, does not mean that he knows everything about it.

Of course there would be no market for forged or altered or counterfeited monies or securities, or what have you, unless an innocent third party could be duped thereby.

So the fact alone that the defendant was, in fact, the recipient of a forged document, and that he negotiated it, that alone, I submit to your Honor, makes no difference whatsoever unless there is some concrete evidence that he knew the background of the document in question, and of the person that negotiated it or transferred it to him.

The Court has heard the evidence. I'm not going to go into the evidence of the case.

Secondly, the other basis, and upon which I think Mr. Cioffi actually -- or was moved to seek our assistance in this -- was to see whether or not Mr. Catania was involved -- no matter how peripherally -- with crime, or with any kind of dealings or transactions in this type of activity.

In that connection Mr. Harrington, who is a partner of mine, who is the former head of the Organized Crime Strike Force in New England, was questioned. And

he made certain inquiries of people.

And I'm going to ask the Court to listen to Mr. Harrington, and he will describe to you who he called and the results of that conversation.

And he will make this representation to the Court as an officer of the court.

As the Court knows, the defendant has absolutely no criminal record.

He has never been in court in his life, to my knowledge.

I think he had one traffic violation.

But on any crime involving moral turpitude, or anything else, this is his first time and his first involvement.

He's a man sixty-two years old. A grandfather. His health is not the best.

I think a letter was shown to the Court from Dr. Boles in Boston who performed a colostomy on the defendant back in 1975.

As a result of his incarceration his nervousness is acting up again. He's uncomfortable. And the chances are that he will require some additional surgery.

Based upon his lack of criminal record -- from what we were able to determine -- and which Mr. Harrington will go into in some further detail -- the facts involved

toll on his life.

THE COURT: And there was some talk -- putting the cart before the horse -- if he were free he'd go around and make a search and find out just who --

MR. CIOFFI: He would try to help the District Attorney's office.

THE COURT: -- who passed this check -- or is passing these checks.

MR. CIOFFI: Right.

THE COURT: And --

MR. CIOFFI: And we did.

THE COURT: -- if they have a press.

That all came to me as news that he can do it after but he can't do it --

MR. CIOFFI: Not that he can do it, Judge.

THE COURT: But they want to know, I think, -- from what you tell me -- the District Attorney wants to know what does he know about anybody who prints these checks? And, presumably, --

MR. CIOFFI: He didn't know anything.

But we did -- I called the District Attorney about a week ago, Judge, and gave him information, supplied by the defendant, that there was a man incarcerated in the Simms Street Jail in Connecticut who fits the description of Charles Munroe.

said, we are not going into that aspect of it, Judge. We are not going to question the jury's actions.

All we're trying to do is present to you, Judge, that if certain information was available we would give it to the District Attorney's office.

The District Attorney's office based their recommendation on the fact that Mr. Burke had a notion or some idea or for some reason believed that this man knew what was going on.

I went to these gentlemen to go to the sources that they had available to him -- to them to determine whether Mr. Catania was lying to me.

They verified my faith in Mr. Catania by telling me that they checked with the head of the Crime Force, they checked with the head of the State Police, and other sources, and found that Mr. Catania's name is not even recognized among the millions of names that they have of people who are involved in this type of crime or any crime.

And this is the reason why I have these gentlemen here -- to tell his Honor that this is not the type of man who's involved in anything like that, and could give the District Attorney what he wants.

Now the District Attorney is going to make him stay in jail because of something that he can't bring

forward.

If he could, Judge, after three weeks down there, I know Mr. Catania -- Mr. Catania would.

He's broken. Look at him, Judge.

It's not that we're talking about a twenty-two year old young boy that can stand the rigors of incarceration.

With a gall bladder trouble. With pancreas trouble. Supposed to be on a bland diet and is not getting it. It's taken its toll on his health, Judge.

So I implore you as a man, as a human being, Judge, to please reconsider and give this man a chance.

I mean, after all, here's a man who's been in business for over forty years -- started out when he was fourteen years old as a barber, Judge, and worked his way up to where he is now.

A man who made -- who made deposits in the same bank of over three hundred thousand dollars.

Do you think he'd have to go around stealing nine thousand dollars?

He's got forty-five acres of land that's worth a hundred eighty thousand in New Hampshire.

He's got acres of land down in Taunton that are worth forty, fifty thousand dollars.

It's not the fact that this is a man who is

Four victims of Bay State political vengeance

DAVID FARRELL

At the height of the Boston Common Garage scandal two decades ago, the assistant attorney general investigating the sensitive political case became impatient with the enormous pressures exerted on him by individuals with political connections. The prosecutor finally went public with a condemnation of Massachusetts politics.

That was the political end of Robert J. DeGiacomo, one of the most fearless prosecutors ever to grace a courtroom here. When he ran for attorney general several years later, he was castigated by the pack that takes offense when a strong prosecutor follows his oath and does his thankless job.

And they were waiting for him in the 1970s when he applied for a magistrate's opening in the US District Court. He was scuttled partly through an whispering campaign that suggested he did not have the proper judicial temperament for the judgeship. Later, after the media focused on his plight, DeGiacomo was approved for the next vacancy. He has been an outstanding magistrate.

In the mid-1960s, the man who headed Atty. Gen. Edward W. Brooke's criminal division made the mistake of aggressively prosecuting cases referred to it by the Crime Commission that was so active from 1963 through mid-1965.

For his cardinal sins in indicting and convicting several members of the Executive Council, Walter Jay Skinner was vilified by the late Councilor Patrick J. McDonough in 1969.

Three times former Gov. Francis W. Sargent sent his name to the council for confirmation as a Superior Court judge. Each time McDonough won by a 5-2 vote and only served to bring more shame to a state that was trying to shake its reputation as one of the most politically corrupt in the nation.

Eventually Brooke, when he was in the Senate, persuaded President Nixon to make Skinner a US district court judge. That was late in 1973. McDonough announced he would appear before the Senate Judiciary Committee to oppose Skinner. McDonough didn't show up, however, and Skinner was confirmed. He, too, has since been a model of judicial excellence.

SKINNER

DeGIACOMO

HARRINGTON

WARD

More recently Gov. Michael S. Dukakis gave John William Ward, Amherst College president, the task of heading a special commission probing the MBM scandal and other state building ripoffs. Ward, his fellow commission members, chief counsel Bancroft Littlefield and his deputy, Thomas Dwyer, did an extraordinary job.

So extraordinary that Ward was blacklisted and unable to get a position in the state after the commission completed its work. He finally left Massachusetts two years ago and is now working in New York – a strange tribute to a man who did his job so well.

Now comes Edward Harrington, former United States attorney for Massachusetts who has been rejected by Gov. Dukakis' Judicial Nominating Council for the manner in which he handled his job as federal prosecutor between 1977 and 1981.

Harrington's major problem was his falling out with Atty. Gen. Francis X. Bellotti over a case involving an employee in Bellotti's consumer protection division who had been shaking down car dealers.

It's no secret on Beacon Hill that Dukakis' judicial screening panel is controlled, in part, by Bellotti. Stephen Delinsky, Earle Cooley and John Moscardelli, all closely allied to the attorney general, were well acquainted with Bellotti's dislike of Harrington when they led the charge against Harrington for a judgeship.

Harrington made mistakes during his four years as federal prosecutor. We all do. I thought he was wrong in criticizing Judge Joseph L. Tauro in the first trial of former state Sen. James Kelly. But that's the way he saw it and he reacted in an open and honest way, backing his assistants all the way.

Being a prosecutor, sworn to uphold the law and pursue political figures who are a lovable lot with many friends to plead their cases, is a thankless and lonely job, as Bellotti knows.

Harrington did an outstanding job as US attorney and deserves better than the shabby treatment accorded him by the Dukakis panel. The people of Massachusetts should never forget that it was Harrington who broke William Masiello for the Ward commission and prepared the way for passage of the many notable reforms which Ward and his team initiated here.

With an eye on his own future, Harrington could easily have played a cute game and not ruffled feathers. Instead he honored his oath and is paying the price. Like DeGiacomo and Skinner, he'll probably have to await a federal opening, unless Dukakis overrides his panel.

David Farrell is a Globe columnist.

CHANGING OF THE GUARD

(By David Farrell)

One of the interesting sidelights of last Tuesday's federal Bar reception at Anthony's Pier 4 was the genuine show of affection accorded US Atty. Edward F. Harrington by the lawyers and judges who labor in the federal courts.

The gathering was highlighted by an official tribute to Magistrate Peter Princi, who has resigned, effective Nov. 1, to go into law practice on the Cape with his son. The occasion also served to introduce incoming US Atty. William F. Weld, Harrington's successor.

The more one observes Weld, the more one sees his potential to become an outstanding US attorney. He and Mark Wolf, who will be his first deputy, had just returned from a conference with federal prosecutors in New York's big Southern District, where the office's political corruption unit has been merged with the organized crime division. Weld and Wolf liked what they saw and may join the two units here after they take over next month. It's no secret that some Bay State politicians and law enforcement officials have ties, direct and indirect, to underworld leaders—a situation that obviously intrigues Weld as he embarks on his federal duties.

But the warmth shown the departing Harrington by the judges and attorneys had to be gratifying to the controversial official. Harrington has stepped on many toes and alienated some officials—notably Atty. Gen. Francis X. Bellotti—over the years. However, his strong commitment to ferret out political corruption and other forms of white-collar crime here has earned him the respect of insiders aware of the magnitude of these abuses.

In a way, it was sad to watch the parade of well-wishers expressing their admiration of him. Harrington would have liked to stay on for another term, but Ronald Reagan's landslide win last November ended that. However, true to his word on the day after the Reagan victory 11 months ago, Harrington continues to be the same aggressive prosecutor during what would be a lame-duck, phase-out period for most departing federal prosecutors with one eye on their upcoming private law practices.

A DISARMING BUT TOUGH PROSECUTOR

His recent thrust with the FBI into allegedly corrupt cable TV franchise awards in Massachusetts tends to bear out his forecast a year ago that fraudulently acquired cable licenses would be the vehicle for establishment of the next crime commission here later this decade.

Harrington is a disarming prosecutor whose easy-going, affable manner belies his absolute abhorrence of public corruption and his singular dedication to lock up political scoundrels.

He's tough and at times inordinately uncompromising in his dealings with political figures. His decision to push the seemingly weak case against Boston School Committeeman John McDonough has exposed him to considerable criticism in defense circles. By contrast, in the Donald Dwight probe, Harrington was quick to clear the former GOP politican, a move which opened him to criticisms from those who feel all politicians are crooks.

Harrington, who gives his staff strong backing and complete freedom to pursue wrongdoing, can be testy and let his Irish temper surface when he gets into a battle with an opponent. But he always has been his own man, whether in his role as a Navy line officer on a destroyer in the 1950s or as a top student at BC Law School.

Soon after he took over as head of the federal New England Strike Force on Organized Crime 11 years ago, he created a furor when he charged that some Bay State politicians have been corrupted by organized crime leaders—a theme which Weld obviously has adopted following his New York trip.

A few months later, in the spring of 1972, Harrington criticized the extent of illegal gambling in Revere and Chelsea, saying "it was a way of life" with "no enforcement" in those cities. He was immediately denounced by a municipal official who later was indicted. He also stood up to former Chief Judge Charles Wyzanski of the US District Court, a gutsy posture, to say the least.

The catalyst for the split between Harrington and Atty. Gen. Bellotti was the federal investigation of an inspector in the attorney general's office. But the breakdown between them actually started when Bellotti called Harrington after the latter was named US attorney in 1977 and asked him to come to his office to discuss law enforcement. Harrington, who had been beaten for AG by Bellotti in the 1974 Democratic primary, agreed to meet, but insisted the sitdown be at his own office. Bellotti complied, but began stewing over the incident.

IMPRESSIVE RECORD OF ACCOMPLISHMENT

Harrington's record of accomplishment in the US attorney's office, which includes the conviction of the notorious Howie Winter, the uncovering of the famous Lloyd, Carr & Co. commodity frauds case, and the jailing of Gerry O'Leary and several other politicians across the state, is too well known to repeat here.

While at the Strike Force he won convictions against such notorious underworld figures as Raymond L.S. Patriarca of Providence. Hario Zannino and Bernie McGarry of Boston and Abe Sarkis of Milton. His work also included several investigations of underworld gambling and racketeering between the mainland US and the Bahamas as well as extensive work in the field of civil rights in the late 1960s and early 1970s.

Gov. Michael S. Dukakis selected him in 1975 to chair the state Alcoholic Beverages Control Commission (ABCC) and clean up the agency which had often been subjected and succumbed to every type of political pressure in previous years. Harrington went in with a flourish and did the job. He shook up the ABCC and fired some of the personnel who had presided over its gradual transformation into a board which was "for sale."

Harrington's cooperation with the Ward Commission, which investigated state corruption for two years, was not well received by the political establishment in Massachusetts. When the Legislature watered down the power of the inspector general legislation, he criticized the two-way game which was being played behind the scenes, as politicians attempted to con the public that they were on the side of good while actually working to undermine the effectiveness of the IG office.

And when Atty. Gen. Bellotti bypassed former FBI top agent Robert Sheehan for the IG position and selected a puppet-like official who would do his bidding. Harrington decried the politics of the move. (Inspector General Joseph Barresi, four months after assuming the IG post, still has not assembled a staff.) All of these actions, of course, will not enhance Harrington's private law practice when he leaves the US attorney's office at the end of the month. But Harrignton, who will join the Framingham law form of Sheridan, Garrahan & Lander, is a man of conviction—not necessarily always right, but always on the level.

BELLOTTI SCUTTLES A JUDGESHIP

There is growing concern among some of Gov. Michael S. Dukakis' liberal friends about what seems to be the governor's excessive reference to Attorney General Frank Bellotti.

This was heightened by Bellotti's heavy-handed and apparently successful blocking of the judicial nomination of former U.S. Attorney Edward "Ted" Harrington.

"One of those liberal friends most saddened" by this incident is Harrington's former prosecutor, Lloyd MacDonald who told us, "I do not understand why Bellotti would want to re-open issues that could only hurt him."

During Harrington's one hour interview with the Judicial Nominating Committee, nearly 40 minutes were taken by questions from former Assistant Attorney General Stephen Delinsky and defense lawyer Earle Cooley.

The questions focused on Harrington's intervention in the Myles Connor murder case, on Dec. 14, 1979, when he personally asked Bellotti to take Norfolk County District Attorney William Delahunt off the case, because he found out not only that Connor was Delahunt's informant, but that it was Connor who had led Delahunt to the burial site of the two women who had been murdered.

Harrington told Bellotti, Delahunt and Delinsky at the Dec. 14 meeting that "several witnesses have told the U.S. Attorney's office that they had previously informed Delahunt of Connor's participation in the double murder and that Delahunt had expressed to these witnesses his opinion that Connor's participation was of a marginal nature."

This column has learned that these same witnesses also told the U.S. Attorney's office that Delahunt had warned "several of these witnesses not to tell anyone they had advised him of Connor's participation in the double murder."

In fact, it was Delahunt who had obtained Connor's parole on another crime in 1977, over Harrington's objections.

Bellotti had no choice but to accede to Harrington's request and appointed Suffolk County Prosecutor Paul Buckley who was successful in convicting Connor, who was, in turn, defended by Earle Cooley. During the trial Cooley called both Delinsky and Delahunt to testify for Connor.

MacDonald told us, "It was a major embarrassment. It looked like Delahunt had made a pact with the devil."

But MacDonald beleives that the issue that most provoked Bellotti's revenge on Harrington was his own successful prosecution of the attorney general's former Consumer Protection investigator and campaign fund-raiser, Richard W. Paul.

"The Boston media let Bellotti off so easily on that case I just can't imagine why he'd want to bring it up again."

In March of 1979 State Police Lt. Ralph DeFuria ("a terrific investigator," according to MacDonald) was told by a Worcester car dealer that Paul, who was supposed to be investigating car dealers for "spinning odometers" (lowering the mileage), had approached him for a bribe.

DeFuria arranged with this dealer for a "set-up" meeting with Paul, and he made a formal request to the attorney general for full surveillance and a wiretap on the dealer.

"The wiretap was essential," MacDonald said, "because juries have trouble accepting one-on-one testimony from used car dealers."

Unfortunately, when long-time Bellotti investigator and aide Lt. Robert Cummings showed up with the surveillance team, there was no wiretap equipment. Cummings said Bellotti would not authorize the tap and "wanted to handle the Paul matter administratively."

"Of course," MacDonald said, "killing the wiretap killed the surveillance. Then DeFuria pulled a brilliant move. With the FBI's help he found a car dealer, John Mari, who had been Paul's intermediary on the bribes, and he 'flipped' him, got him to turn against Paul."

DeFuria then turned Mari over to the FBI who secured a wiretap. Over a period of three weeks. May 24 to June 15, 1979, Mari engaged Paul in a series of six conversations in which Paul not only incriminated himself, but told of a Bellotti cover-up.

As Prosecutor MacDonald told the jury, "Defuria and the FBI agents James Ring and Art Ryall were the Woodward and Bernstein in this case. "The reference was not idle.

During the taped conversations, Paul reassured Mari, "They (the AG's office) are more worried about Bellotti's image than anything else. You've seen Watergate. Well this is the same thing."

Paul said he would not be prosecuted because he "had done the dirty work" for Bellotti such as collecting campaign funds and other political chores, while on state time.

Paul said that First Assistant Attorney General Thomas Kiley had promised to get him another job, instead of prosecuting him, and even arranged for unemployment compensation by telling the Division of Employment Security that Paul was leaving because he couldn't travel to Boston for meetings.

Paul was also quoted on the tapes in depth as being ordered by an aide to Bellotti (Jack Allen) to halt the investigation of a Worcester car dealer who was a close friend of a grocery chain owner who was a "heavy contributor" to Bellotti of $3,000.

On one of the tapes, Paul remembered, "We had a meeting with Frank Bellotti one day, okay? One of the statements he made is that 'what the hell, they've been spinning cars for hundreds of years.' So what he's trying to tell us is that he's got a lot of friends that are doin' it, and he doesn't want us steppin' on their toes. Cause they're giving him a lot of money."

On the same tape, Paul says, "I used to deliver dough to Frank (Bellotti) from judges, and judges are not supposed ta' contribute."

During the trial MacDonald offered to play only those portions of the tape that directly incriminated Paul, but Judge G. Joseph Tauro insisted they be played "in their entirety." Paul was convicted of bribery and served 18 months in prison.

The Boston press said little about the case and has been remarkably silent about the AG's revenge against Harrington, a long-time supporter of Dukakis, but now resigned to not receiving the judgeship that was promised him, in spite of his more than 15 years of distinguished and honest service as a federal prosecutor.

And a lot of the Duke's liberal friends are worried.

Bellotti Allies Oppose Harrington Judgeship

(By David Farrell)

Balancing the state budget is not the only serious problem Gov. Michael S. Dukakis has been struggling with during the past fortnight.

The governor has been caught in the middle of a battle within his Judicial Nominating Council over the application of former US Atty. Edward F. Harrington of Needham, his longtime supporter, to be a judge of the Superior Court.

Harrington, who filed application with the 18-member panel weeks ago, knew he might have some trouble when Dukakis revealed the identity of the commission members a few months ago.

Several, including such well known lawyers as Earle C. Cooley, former Asst Atty. Gen. Stephen R. Delinsky and former Suffolk Asst. Dist. Atty. John M. Moscardelli, are closely allied to Atty. Gen. Francis X. Bellotti. The attorney general has nothing but disdain for Harrington who, he feels, lacks the proper temperament to be a judge. Like Harrington, Bellotti also has been a strong backer of Dukakis over the years.

The bad blood goes back to the poor working relationship between them when Harrington was US attorney here from 1977–1981. Some harsh comments by one the federal prosecutor's assistants concerning the way Bellotti and First Asst. Atty. Gen. Thomas Kiley handled an internal case triggered a major rupture in the previously good relations between Bellotti and Harrington. Harrington's assistant, D. Lloyd MacDonald, late indicated he regretted the implication that could be drawn from his remarks.

Harrington had embarrassed the attorney general's office when he decided to prosecute an employee of the office who had been fired by Bellotti for shaking down car dealers.

None of the principals involved in the infighting on the governor's judicial screening panel will discuss the case publicly, Bellotti has advised Harrington, through an intermediary, that he has not and will not make any overt effort to block his confirmation by the judicial council.

When Harrington called Kiley to complain about the rough handling he felt he got from members of the committee during his interview with the panel, Kiley advised him that the attorney general was maintaining a hands-off policy.

Kiley reportedly told Harrington that there is no doubt that some members of the screening council who are friendly with Bellotti are aware of his deep hostility towards Harrington and could be reflecting this in their deliberations.

Neither Daniel A. Taylor, council chairman, nor any other member will discuss the deliberations which are supposed to be kept secret. The rugged interrogation to which Harrington was subjected apparently convinced him that he may have trouble surviving the screening process—a prerequisite for appointment to the bench by Dukakis. It prompted the call to Bellotti's top deputy.

Delinsky, chief of Bellotti's criminal division for six years until he went into private law practice early this year, heads the judicial council's search committee which has been recruiting lawyers for the three Superior Court openings Dukakis will fill this summer. One will go to a woman. Harrington is one of a dozen men who have applied for the other two.

The council is not expected to vote on Harrington and the other applicants until next month. Although it is unlikely that he will be rejected, Harrington could find himself lacking sufficient support to wind up in the initial list of three candidates who will be submitted to Dukakis for the first vacancy.

Under the executive order he issued establishing the screening council, the governor has agreed to appoint judges only from a list recommended by at least 10 members of his panel. If he is not satisfied with the first three names, he has the prerogative of asking for a second list, according to the guidelines worked out with Dukakis' chief counsel, Stephen Rosenfeld, who is also a protege of Atty. Gen. Bellotti.

Dukakis easily may wind up in a bind similar to what he experienced in his first term when he wanted to name Paul Liacos to the Supreme Judicial Court. Some members of his previous Judicial Nominating Council opposed Liacos. But Dukakis overrode their objections and now even his opponents concede Liacos is an outstanding justice.

The unfortunate aspect of the ill feelings between Bellotti and Harrington is that they were once political allies. After Harrington lost to Bellotti in the 1974 primary, he supported him in his tough battle with the late Josiah Spaulding. Bellotti subsequently helped Harrington get the chairmanship of the Alcoholic Beverages Control Commission. In 1977 Sen. Edward M. Kennedy picked him as US attorney for Boston. An uncompromising prosecutor, Harrington came down hard on political corruption during his four-year term.

Sheridan,
Garrahan
&
Lander

Attorneys At Law

JOHN P. GARRAHAN
JAY J. LANDER
JOHN R. O'NEILL
JOHN D. MULLEN
MICHAEL C. DONAHUE
GEORGE E. McCARTHY, JR.
JAMES D. HANRAHAN
JOANNA CONNOLLY

MICHAEL G. GATLIN
PETER B. BARBIERI
MICHAEL W. SOWYRDA
MICHAEL A. McOSKER

OF COUNSEL
EDWARD F. HARRINGTON
JOSEPH J. HURLEY

January 20, 1988

Senator Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Biden:

This is in response to your letter dated January 12, 1988, requesting my answers to additional questions raised since the second hearing on my nomination.

Q. 1. The committee received a letter from Attorney Stephen Delinsky, a copy of which is enclosed, raising concerns about a number of actions taken by you. Please explain the circumstances of your actions in responding to the following charges by Mr. Delinsky:

(a) That as a result of prosecutorial actions taken by you as U.S. Attorney, cooperation deteriorated between federal and state law enforcement officials in Massachusetts. (In responding to this charge, it would also be helpful if you would address yourself to the events described in the enclosed column from the Boston Globe dated June 14, 1981 and the enclosed column from the Boston Herald dated September 26, 1986.)

(b) That after the Judicial Nominating Council turned down your application for a state judgeship, you publically and privately berated Mr. Delinsky for his role in the nominating process, using extremely harsh language.

A. 1. (a) There was excellent cooperation between federal and state authorities while I was U.S. Attorney, as evidenced by the Masiello-Manzi state corruption prosecution, the historic Ward Commission hearings into corruption in the award of state contracts, the joint federal-state investigation of the notorious criminal figure Myles Connor, and the Jarabek bribery investigation. See Boston Globe article dated October, 1981. However, the federal prosecution of Richard Paul, an employee of the Attorney General's office, and the F.B.I.'s investigation of Myles Connor, an informer for District Attorney Delahunt caused some strains between the offices. I will set forth the background of each case.

U.S. v. Richard Paul - As U.S. Attorney, my office prosecuted an agent assigned to the consumer protection unit of the Massachusetts Attorney General's Office for "shaking down" used car dealers under his regulatory jurisdiction. The prosecution resulted from a six-month joint F.B.I. - State Police investigation which involved the use of electronic surveillance. The case was prosecuted in the federal court after the Attorney General declined to prosecute and decided to handle the matter administratively. Paul has been a campaign worker for the Attorney General. Defendant Paul's electronically intercepted conversations contained remarks which proved embarrassing to the Attorney General and led to a deterioration in our working relationship. The defendant was sentenced to an eighteen month term of imprisonment.

Commonwealt v. Connor - This was a state prosecution against a notorious criminal figure for his alleged involvement in the double-murder of two young women who were killed because they had been witnesses to a prior murder. The investigation was conducted jointly by the F.B.I. and the Boston Police Department. As U.S. Attorney, I requested the Massachusetts Attorney General to appoint a Special Prosecutor in place of District Attorney Delahunt to prosecute the case. The reason for this action was that Connor was the District Attorney's informer and the investigative agencies believed that, because of this relationship, the District Attorney might not be vigorous in pressing the case. The Attorney General agreed with my request and appointed a Special Prosecutor to try the case. Connor was convicted at the first trial. The District Attorney and his First Assistant testified on Connor's behalf that he was not involved in the murders. I called on the Attorney General to investigate the District Attorney's role in the conduct of the double-murder investigation to determine what influence his relationship with Connor had on his less than vigorous investigative efforts. The double-murder probe had been conducted in an atmosphere of intense mistrust between the F.B.I./Boston Police Department and the District Attorney's Office because Connor had allegedly been an accessory to the murder of a Boston Police Officer and the Boston Police Department felt the District Attorney had been protecting his informer. This animosity pre-dated my becoming U.S. Attorney. It should be noted that Mr. Delinsky testified on behalf of Connor.

I had a close working relationship with former District Attorneys Byrne and Droney (as well as then Assistant District Attorney and now Senator Kerry) and current District Attorneys Flanagan, Ryan, Conte, and Rollins. (Flanagan, Byrne, and Ryan have contacted the Senate Judiciary Committee on my behalf, as have former and current Massachusetts State Police officials Keogh and Condon.) Current District Attorney Harshbarger was not in office when I served as U.S. Attorney, but when I left office, he, as Chairman of the Ethics Commission, wrote me a note lauding my accomplishments. He also told me personally that I was his model as a prosecutor.

As a public prosecutor, I developed such significant accomplice witnesses as Joseph Baron, Vincent Teresa, "Red" Kelley, William Masiello and many others whose use as witnesses I always made available to local prosecutorial authorities. Cooperation with local law enforcement was my hallmark.

Peter Lucas' political column in the midst of a partisan political campaign reflected that all Democratic District Attorneys were supporting my Democratic opponent, which is hardly surprising. The sole Republican District Attorney, Rollins, supported me.

(b) I spoke with Mr. Delinsky on the telephone on one occasion and that was two days prior to my appearance before the Nominating Council in May, 1983. I placed this call because I had been told that he was soliciting votes against me and I did not believe this to be so. I asked him if this allegation were true and he denied it and, in fact, said that he was going to support me because "your record speaks for itself".

After my rejection, I spoke to him on only one occasion. I was standing up having a sandwich with a group of attorneys at the Steaming Kettle sandwich shop in City Hall Plaza. Mr. Delinsky came into the lower store, saw me, blushed, and immediately turned and hurriedly departed the premises. The six or seven attorneys who were conversing together laughed, including myself, for it was obvious that Mr. Delinsky was not desirous of speaking to me. In a jocular manner, I said to him as he was departing, "Steve, there's no need to run away, we're all friends here" or words to that effect.

See Boston Globe articles dated May 23, 1983 and July 18, 1983. Also see Boston Herald article dated September 1, 1983.

Q. 2. According to a report that appeared in the Boston Phoenix in June of 1981, a copy of which is enclosed, you used crude language to describe U.S. District Judge Joseph Tauro after Judge Tauro declared a mistrial in a hotly contested public corruption case that your office had been prosecuting. Please explain the circumstances of your remarks in that situation, and respond to the following additional charges made in the article:

(a) That you were well aware of a potential conflict of interest between Judge Tauro and the defendant in the case long before the case went to trial, but waited until after the mistrial in the case to move for recusal.

(b) That you provided information to the press about the potential conflict of interest between Judge Tauro and the defendant and then later premised your motion to recuse the Judge in part on the fact that the Judge's impartiality "has been questioned in the public media".

A. 2. The Kelly case was a most significant public corruption case, as it was one of the few, if not the sole prosecution to come from the celebrated Ward Commission hearings. It was a very intensely contested trial conducted over a six week period. The jury stood 11-1 for conviction after only approximately twelve hours of deliberation. I was called to the court room under the belief that the jury was returning a guilty verdict. I was met in the corridor outside of the court room by Assistant United States Attorney Macdonald and the F.B.I. agent assigned to the case who motioned me to huddle privately with them in a corner of the corridor, which I did. Mr. MacDonald surprised me by saying that a mistrial was going to be declared. I uttered an oath in a private conversation with Mr. Macdonald and the agent because I was absolutely shocked that a mistrial would be granted after such a short period of deliberation. The corridor was crowded at the time, as the trial was in a brief recess, and that is why we had to huddle in a corner where we remained to devise our argument to persuade the Judge not to declare a mistrial under the circumstances.

(a) I was not aware of any facts sufficient to lead me to believe that any potential conflict of interest existed before the case was tried.

(b) I did not provide any such information to the press. The David Wilson article caused the U.S. Attorney's office to request the F.B.I. to conduct an investigation into the matter and the motion to recuse was based upon the results of this probe. U.S. District Judge Douglas Woodlock (then an Assistant U.S. Attorney) was in charge of the probe and drafted the motion.

Q. 3. In March of 1977, several years after your service as Chief of the Organized Crime Strike Force in Boston, you appeared in court with Attorney Albert Cioffi at a hearing on reduction of sentence for a criminal defendant named Louis Catania. Catania believed that he had received a stiff sentence because of allegations that he was involved with organized crime. According to a transcript of the hearing, a portion of which is enclosed, Mr. Cioffi reported to the court that you had checked with sources in the Organized Crime Strike Force and found that there was no indication that Mr. Catania had ties to organized crime. This transcript raises a number of questions:

(a) Was the information you obtained from the Organized Crime Force about Mr. Catania confidential information or derived from confidential information? If so, was it appropriate for you to disclose the information?

(b) Did you or your firm receive a fee for your appearance in this action?

(c) Did you ever receive a fee on any other occasion to provide representation or testimony concerning an individual's links to organized crime? If so, please describe the circumstances.

(d) When you were U.S. Attorney or Chief of the Organized Crime Strike Force, did you ever provide information to a private attorney concerning an individual's links to organized crime? If so, please describe the circumstances.

A. 3. Four years after I had left the Strike Force, I was called by my then private law partner, Paul Markham, to be available to testify as an expert witness in a hearing relating to a motion to revise and revoke the defendant Catania's sentence. It was Mr. Markham's understanding, which turned out to be erroneous, that at least part of the basis for the defendant's sentence was his alleged involvement in organized crime. At that time I was one of the state's most prominent experts on organized crime and was always being called upon to lecture and comment on the subject. Mr. Markham asked me if the defendant was a member of the organized criminal element and I advised him that based on my knowledge and experience he was not as I had never heard of him. I told Mr. Markham that I would verify my personal knowledge with various sources of mine who were knowledgeable about criminal matters whom I asked if they had heard of Mr. Catania. I never received any confidential information from any source; I only learned that my sources had no information regarding the defendant, as they had never heard of him either.

(a) I did not ask for nor receive any confidential information from the Organized Crime Strike Force about Mr. Catania. No source I contacted had any information regarding him whatsoever. No source had ever heard of him. A lawyer has the responsibility to seek from all sources, governmental or others, appropriate information in order to fully represent his client and to clear him from false allegations.

(b) I did not personally receive a fee. Mr. Markham, I am sure, received a fee for representing his client.

(c) No.

(d) No.

Very truly yours,

Edward F. Harrington

Edward F. Harrington

/pw

Sheridan,
Garrahan
&
Lander

Attorneys At Law

JOHN P. GARRAHAN
JAY J. LANDER
JOHN R. O'NEILL
JOHN D. MULLEN
MICHAEL C. DONAHUE
GEORGE E. McCARTHY, JR.
JAMES D. HANRAHAN
JOANNA CONNOLLY

MICHAEL G. GATLIN
PETER R. BARBIERI
EUGENE GURVITS
MICHAEL W. SOWYRDA
MICHAEL A. McOSKER
MICHAEL B. COHEN

OF COUNSEL
EDWARD F. HARRINGTON
JOSEPH J. HURLEY

January 29, 1988

Senator Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
Washington, D. C. 20510-6275

Dear Senator Biden:

Since I responded on January 20, 1988, to the questions raised by Stephen Delinsky's letter, the Senate Judiciary Committee has received letters from Attorney Carle C. Cooley and from the Women's Bar Association concerning my nomination. Although these letters do not appear to raise any new matter requiring a response, I submit this clarification so that the record will be complete.

(1) Mr. Cooley's Letter Although I have known Mr. Cooley for years and respect him as an attorney, our principal professional involvement has been as adversaries in intensely litigated criminal matters relating to Mr. Cooley's client, Myles Connor. While I was U. S. Attorney my office was involved in the federal bank robbery prosecution and the joint Boston Police/FBI double murder investigation of Connor. Matters relating to Myles Connor were discussed in my response to Mr. Delinsky and in the newspaper articles attached to that response. Mr. Delinsky testifed on behalf of Connor in the double murder case. Mr. Cooley defended Connor in both the state and federal cases. And Attorney Alice Richmond was the attorney for Connor's girl friend in the federal case.

Mr. Cooley's letter focuses upon the government's use of witnesses involved in the Federal Witness Protection Program. Mr. Cooley and I have a longstanding and fundamental philosophic difference regarding the Witness Protection Program. It has been my belief since my involvement in the "labor-racketeering" investigations of the early 60's that the successful prosecution of organized crime requires the establishment of such a program to insure the safety of the so-called accomplice witness. The Congress, under the same belief, created the Witness Protection Program as part of the Organized Crime Control Act of 1970. The program is administered by the U. S. Marshall's Service.

The testifying accomplice witness in many cases is the pre-requisite to the prosecution of a major criminal figure because of the essential character of organized crime - the "insulation" of the "boss" from the overt criminal

act. This necessitates the testimony of an associate of the "boss" who can provide the evidentiary link between the criminal command and the criminal act. This type of witness is rare because of the underworld's code of silence and fear of reprisal. Skilled law enforcement is ever alert to circumstances which are ripe for the development of this type witness growing out of the ever-occurring fallings-out between underworld associates, and is prepared to provide the protection detail while the accomplice witness is waiting to testify and the change of identity and geographic relocation when his testimony is completed.

I have been involved in almost every major public corruption and organized crime investigation conducted in Massachusetts from the early 60's to the early 80's and over that period I was engaged in the development of many significant accomplice witnesses. I never used an accomplice witness unless I was convinced that he was telling the truth and his testimony had been corroborated to the fullest extent possible. Nor did I ever condone any wrongdoing on any witness's part. No court has ever found fault with my handling of such witnesses.

Mr. Cooley's letter refers to three specific protected witnesses:

(a) Joseph (Baron) Barboza was the first of the major accomplice witnesses developed in this part of the county. He was the chief goverment witness in the successful prosecution of the syndicate leader Raymond L. Patriarca in 1968. His successful protection inspired the decision of other major accomplice witnesses to cooperate with the federal government, including Vincent C. Teresa and John J. "Red" Kelley, whose testimony had significant impact on the organized underworld in the late 60's and early 70's. Barboza's protection detail served as the prototype upon which the Witness Protection Program was established when it came into being in 1970. After Barboza completed his testimony and was released from the Program, having been relocated and provided with a new identity, he committed a homocide. Under authorization of the Justice Department, two F. B. I. agents and I provided the California Court with information relating to Barboza's cooperation with federal authorities. His punishment in the homocide case was determined by the California Court. When Barboza was released from prison after serving his sentence he was murdered gangland-style in retaliation for his testimony against organized crime.

(b) Thomas Sperrazza and Diane Wazen were associates of Myles Connor and were key witnesses in the double-murder and bank robbery cases. Sperrazza remained in prison under a new identity while he was in the witness protection program. No promise was ever made to him that he would be released from prison in exchange for his cooperation. He still remains in prison serving a life sentence.

(c) Diane Wazen was first developed as a witness by the Norfolk County District Attorney's Office in its successful prosecution of Thomas Sperrazza for his part in the double-murder. She later testified for the Attorney General's office in the double murder case against Connor and for my office in the federal bank robbery case against Connor. She was prosecuted by the Norfolk County District Attorney's Office for her involvement in a bad check scheme. My office did not interfere with that prosecution. The extent of her cooperation with law enforcement was brought to the attention of her sentencing judge.

(2) The Women's Bar Association Letter The Women's Bar Association stated that it based its action solely on the testimony of Alice Richmond before the Senate Judiciary Committee on December 9, 1987. Apparently the Women's Bar Association did not have available to it the record of the entire proceedings, including my testimony and that of four other witnesses. This additional evidence addressed fully matters raised by Ms. Richmond. I regret that the Association acted without all of the facts. There was significant evidence presented to the Committee of my efforts to advance the cause of women in the federal court, an interest to which I have always been committed. I would have welcomed the opportunity to address the matter before the Association.

I hope this letter provides clarification concerning the letters from Mr. Cooley and the Women's Bar Association.

Very truly yours,

Edward F. Harrington

Edward F. Harrington

EFH/mr

2224M

Via Federal Express
No. 6598548832

Sheridan,
Garrahan
&
Lander

Attorneys At Law

JOHN P. GARRAHAN
JAY J. LANDER
JOHN R. O'NEILL
JOHN D. MULLEN
MICHAEL C. DONAHUE
GEORGE E. McCARTHY, JR.
JAMES D. HANRAHAN
JOANNA CONNOLLY

MICHAEL G. GATLIN
PETER R. BARBIERI
EUGENE GURVITS
MICHAEL W. SOWYRDA
MICHAEL A. McOSKER
MICHAEL B. COHEN

OF COUNSEL
EDWARD F. HARRINGTON
JOSEPH J. HURLEY

January 29, 1988

Senator Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Biden:

This letter is a supplemental response to your letter dated January 12, 1988, requesting my answers to additional questions raised since the second hearing on my nomination. This supplemental response amplifies my original response dated January 20, 1988, and in effect supersedes it.

Q. 1. The committee received a letter from Attorney Stephen Delinsky, a copy of which is enclosed, raising concerns about a number of actions taken by you. Please explain the circumstances of your actions in responding to the following charges by Mr. Delinsky:

(a) That as a result of prosecutorial actions taken by you as U.S. Attorney, cooperation deteriorated between federal and state law enforcement officials in Massachusetts. (In responding to this charge, it would also be helpful if you would address yourself to the events described in the enclosed column from the Boston Globe dated June 14, 1981 and the enclosed column from the Boston Herald dated September 26, 1986.)

(b) That after the Judicial Nominating Council turned down your application for a state judgeship, you publically and privately berated Mr. Delinsky for his role in the nominating process, using extremely harsh language.

A. 1. (a) During my term as U.S. Attorney, there was excellent cooperation between federal and state authorities. This cooperation is evidenced by matters such as: the Masiello-Manzi state corruption prosecution; the joint federal-local investigation of the notorious criminal figure Myles Connor, resulting in his state murder conviction; the federal-local Jarabek bribery investigation, and the historic Ward Commission hearings into corruption in the award of state contracts, during which federal agents and attorneys worked to the maximum permissible extent to provide

The Meadows • 161 Worcester Road — P.O. Box 867 • (617) 879-5700 • Telecopier (617) 872-1492 • Framingham, Massachusetts 01701

evidence and witnesses to a blue-ribbon state special investigatory commission. In this regard, the same columnist (David Farrell), who wrote the June 14, 1981 column referred to in your letter, four months later wrote that:

Harrington's cooperation with the Ward Commission, which investigated state corruption for two years, was not well received by the political establishment in Massachusetts. [Boston Globe, October 1981; copy enclosed.]

and two years later wrote that:

The people of Massachusetts should never forget that it was Harrington who broke William Masiello for the Ward Commission and prepared the way for passage of the many notable reforms which Ward and his team initiated here. [Boston Globe, July 18, 1983; copy enclosed].

When I was U.S. Attorney, it was my policy to cooperate whenever and wherever possible with local law enforcement agencies to the maximum extent possible, and the record demonstrates that this was done.

I had a close working relationship with former District Attorneys Byrne and Droney (as well as then Assistant District Attorney and now Senator Kerry) and current District Attorneys Flanagan, Ryan, Conte, and Rollins. (Flanagan, Byrne, and Ryan have contacted the Senate Judiciary Committee on my behalf, as have former and current Massachusetts State Police officials Keogh and Condon.) Current District Attorney Harshbarger was not in office when I served as U.S. Attorney, but when I left office, he, as Chairman of the Ethics Commission, wrote me a note lauding my accomplishments. He also told me personally that I was his model as a prosecutor.

As a public prosecutor, I developed such significant accomplice witnesses as Joseph Baron, Vincent Teresa, "Red" Kelley, William Masiello and many others whose use as witnesses I always made available to local prosecutorial authorities. Cooperation with local law enforcement was my hallmark.

Unfortunately, however, strains developed between my office and two state law enforcement offices as the result of pursuit by federal authorities of two matters which involved and had an adverse public impact upon those two state offices: the federal conviction of Richard Paul, an investigator from the Massachusetts Attorney General's Office, for extortion in connection with his official duties; and the F.B.I.'s investigation and assistance in the conviction for murder of Myles Connor, an informant of the Norfolk County District Attorney. It is these matters which were the subject of the inter-office friction described in the June 14, 1981 Boston Globe and September 26, 1986 Boston Herald pieces referenced in your letter. Some background is necessary to put these matters into perspective.

U.S. v. Richard Paul - The U.S. Attorney's office prosecuted an agent assigned to the consumer protection unit of the Massachusetts Attorney General's Office for "shaking down" used car dealers under his regulatory jurisdiction. The prosecution resulted from a six-month joint F.B.I. - State Police investigation involving electronic surveillance, which clearly documented that Paul was engaged in an ongoing scheme to extort money. The case was prosecuted in the federal court only after the Attorney General declined to prosecute and decided to handle the matter administratively. Paul has been a campaign worker for the Attorney General. The defendant was sentenced to an eighteen-month term of imprisonment. At the trial, the evidence consisted in part of highly inflammatory tape-recorded statements by Paul, who volunteered material obviously embarrassing to the Attorney General. Despite the government's efforts at trial to limit the portions of the tapes which were played at the trial, the trial judge required that they be played in full. The enclosed Boston Herald article of September 1, 1983 provides more background concerning this case. It should be noted that Mr. Delinsky was Chief of the Criminal Bureau in the Massachusetts Attorney General's Office during these embarrassing events.

Commonwealth v. Connor - This was a state prosecution against a notorious criminal figure for his alleged involvement in the double-murder of two young women who were killed because they had been witnesses to a prior murder. The investigation was conducted jointly by the F.B.I. and the Boston Police Department. As U.S. Attorney, I requested the Massachusetts Attorney General to appoint a Special Prosecutor to prosecute the case in place of Norfolk County District Attorney Delahunt, who had jurisdiction of the case. The reason for this action was that Connor was the District Attorney's informer and the investigative agencies believed that, because of this relationship, the District Attorney might not be vigorous in pressing the case. The Attorney General agreed with my request and appointed a Special Prosecutor to try the case. Connor was convicted at the first trial. The District Attorney and his First Assistant testified on Connor's behalf. After the guilty verdict was returned, the District Attorney publicly expressed his opinion that Connor was innocent. I called on the Attorney General to investigate the District Attorney's role in the conduct of the double-murder investigation to determine what influence his relationship with Connor had on his less than vigorous investigative efforts. The double-murder probe had been conducted in an atmosphere of intense mistrust between the F.B.I./Boston Police Department and the District Attorney's Office because Connor had allegedly been an accessory to the murder of a Boston Police Officer and the Boston Police Department felt the District Attorney had been protecting his informer. This animosity pre-dated my becoming U.S. Attorney. It should be noted that Mr. Delinsky testified on behalf of Connor at the trial. The previously referenced Boston Herald article of September 1, 1983 also provides background concerning the Connor matter.

In both the Paul case and the Connor case, I made hard decisions to pursue the matters neutrally but vigorously as I believe my duty dictated, despite the fact that these matters involved potential embarrassment to state authorities. It is regrettable that these matters caused tension with the involved state authorities, but I believe it would have been inappropriate to have dropped the matters simply because of whom was involved.

Peter Lucas' political column, referred to in your letter, published in the midst of a partisan political campaign reflected that all Democratic District Attorneys were supporting my Democratic opponent, which is hardly surprising. The sole Republican District Attorney, Rollins, supported me.

(b) In 1981, I first submitted my name as a potential nominee for a judgeship on the Massachusetts Superior Court. Although I was interviewed by and found qualified by Governor King's Judicial Nominating Council, I was not formally nominated by the Governor. In 1983, I re-submitted my name to Governor Dukakis' new Judicial Nominating Council. Mr. Delinsky, who had not been a member of the 1981 panel, was on the 1983 panel. I did speak with Mr. Delinsky concerning my application, but not in the manner described in his letter.

I spoke with Mr. Delinsky on the telephone on one occasion and that was two days prior to my appearance before the Judicial Nominating Council in May, 1983. I placed this call because I had been told that he was soliciting votes against me and I did not believe this to be so. I asked him if this allegation were true and he denied it and, in fact, said that he was going to support me because "your record speaks for itself".

After the Council did not endorse me, I spoke to him on only one occasion. I was standing up having a sandwich with a group of attorneys at the Steaming Kettle sandwich shop in City Hall Plaza in Boston. Mr. Delinsky came into the store, saw me, blushed, and immediately turned and hurriedly departed the premises. The six or seven attorneys who were conversing together laughed, including myself, for it was obvious that Mr. Delinsky was not desirous of speaking to me. In a jocular manner, I said to him as he was departing, "Steve, there's no need to run away, we're all friends here," or words to that effect.

The enclosed Boston Globe articles dated May 23, 1983 and July 18, 1983 and a Boston Herald article dated September 1, 1983 all provide background concerning the 1983 Judicial Nominating Council situation and Mr. Delinsky's connection therewith. In summary, these articles contend that my lack of success before the 1983 Judicial Nominating Council reflected political vengeance in which Mr. Delinsky had a role, resulting in part from strains with the Attorney General concerning the Paul case, discussed above.

Q. 2. According to a report that appeared in the Boston Phoenix in June of 1981, a copy of which is enclosed, you used crude language to describe U.S. District Judge Joseph Tauro after Judge Tauro declared a mistrial in a hotly contested public corruption case that your office had been prosecuting. Please explain the circumstances of your remarks in that situation, and respond to the following additional charges made in the article:

(a) That you were well aware of a potential conflict of interest between Judge Tauro and the defendant in the case long before the case went to trial, but waited until after the mistrial in the case to move for recusal.

(b) That you provided information to the press about the potential conflict of interest between Judge Tauro and the defendant and then later premised your motion to recuse the Judge in part on the fact that the Judge's impartiality "has been questioned in the public media".

A. 2. The Kelly case was a most significant public corruption case, as it related to matters publicized during the celebrated Ward Commission hearings and involved allegations of extortion by the former Chairman of the Massachusetts Senate Ways and Means Committee. It was a very intensely contested trial conducted over a six week period. The jury stood 11-1 for conviction after only approximately twelve hours of deliberation. I was called to the court room under the belief that the jury was returning a guilty verdict. I was met in the corridor outside of the court room by Assistant United States Attorney Macdonald and the F.B.I. agent assigned to the case, who motioned me to huddle privately with them in a corner of the corridor, which I did. Mr. MacDonald surprised me by saying that a mistrial was going to be declared. I uttered an oath in a private conversation with Mr. Macdonald and the agent because I was absolutely shocked that a mistrial would be granted after such a short period of deliberation, particularly in view of the length of the trial and the fact that only one juror appeared to be in dissent. The corridor was crowded at the time, as the trial was in a brief recess, and that is why we had to huddle in a corner where we remained to devise our argument to persuade the Judge not to declare a mistrial under the circumstances. The comment I made was private, and it is regrettable that a newsreporter apparently overheard it and chose to print it in the Boston Phoenix.

(a) Prior to the trial of the Kelly case, I was not aware of any facts which would have lead me to believe that any potential conflict of interest existed sufficient to support the recusal of Judge Tauro. Although the First Circuit found the issue of the timeliness of the motion to recuse Judge Tauro to be a close question, the Court "accept[ed] the prosecutor's position that he had not felt that an earlier motion to disqualify would have been justified by the facts then available to him and [did] not find this

motion to be untimely." In re United States, 666 F. 2d 690, 694 (1st Cir. 1981). The first concrete notice I received of the potential conflict was in the David Wilson column in the Boston Globe on June 1, 1981, weeks after the mistrial had been declared. As the First Circuit noted, "[t]he Wilson article caused the prosecutor to instigate an F.B.I. investigation to probe the facts of the reported relationships." Id. at 692.

(b) I did not provide any such information to the press. As already noted, the David Wilson article caused the U.S. Attorney's office to request the F.B.I. to conduct an investigation into the matter, and the motion to recuse was based upon the results of this probe. U.S. District Judge Douglas Woodlock (then an Assistant U.S. Attorney) was in charge of the probe and drafted the motion.

Q. 3. In March of 1977, several years after your service as Chief of the Organized Crime Strike Force in Boston, you appeared in court with Attorney Albert Cioffi at a hearing on reduction of sentence for a criminal defendant named Louis Catania. Catania believed that he had received a stiff sentence because of allegations that he was involved with organized crime. According to a transcript of the hearing, a portion of which is enclosed, Mr. Cioffi reported to the court that you had checked with sources in the Organized Crime Strike Force and found that there was no indication that Mr. Catania had ties to organized crime. This transcript raises a number of questions:

(a) Was the information you obtained from the Organized Crime Force about Mr. Catania confidential information or derived from confidential information? If so, was it appropriate for you to disclose the information?

(b) Did you or your firm receive a fee for your appearance in this action?

(c) Did you ever receive a fee on any other occasion to provide representation or testimony concerning an individual's links to organized crime? If so, please describe the circumstances.

(d) When you were U.S. Attorney or Chief of the Organized Crime Strike Force, did you ever provide information to a private attorney concerning an individual's links to organized crime? If so, please describe the circumstances.

A. 3. As a threshold matter, I can state unequivocally that I believe that it would be improper for anyone to use confidential government information for personal or private gain. Throughout my years of public service I have never done so and would not countenance it. The situation concerning Mr. Catania did not involve such use of confidential information.

Four years after I had left the Strike Force, I was called by my then private law partner, Paul Markham, to be available to testify as an expert witness in a hearing relating to a motion to revise and revoke the defendant Catania's sentence. It was Mr. Markham's understanding, which turned out to be erroneous, that at least part of the basis for the defendant's sentence was his alleged involvement in organized crime. At that time I was one of the state's most prominent experts on organized crime and was always being called upon to lecture and comment on the subject. Mr. Markham asked me if the defendant was a member of the organized criminal element and I advised him that based on my knowledge and experience he was not as I had never heard of him. I told Mr. Markham that I would verify my personal knowledge with various sources of mine who were knowledgeable about criminal matters whom I asked if they had heard of Mr. Catania. I never received any confidential information from any source; I only learned that my sources had no information regarding the defendant, as they had never heard of him either.

(a) I did not ask for nor receive any confidential information from the Organized Crime Strike Force about Mr. Catania. No source I contacted had any information regarding him whatsoever. No source had ever heard of him. A lawyer has the responsibility to seek from all sources, governmental or others, appropriate information in order to fully represent his client and to clear him from false allegations.

(b) I did not personally receive a fee. Mr. Markham, I am sure, received a fee for representing his client.

(c) No.

(d) No.

Very truly yours,

Edward F. Harrington

Edward F. Harrington

/pw

CONFIRMATION HEARING ON BERNARD H. SIEGAN

THURSDAY, FEBRUARY 25, 1988

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy (acting chairman) presiding.

Also present. Senators Metzenbaum, Heflin, Hatch, and Grassley.

Staff present: Steven J. Metalitz, chief nominations counsel; Andrew Rainer, investigative counsel; Melissa Balaban, nominations clerk; Robert J. Short, minority chief investigator.

Senator LEAHY. Good morning, Mr. Siegan and Mr. Secretary. I apologize for being late. I thought I was the one person in my office invulnerable to the flu, but found that I was not. Sleep we can go without, but the flu catches up. At the risk of having Henry Giugni, Sergeant-at-Arms, come out to my house to pick me up to bring me in here, I wanted to make sure I made it in on my own. Younger people like Senator Hatch, of course, are able to do this much more easily.

Senator HATCH. I think it is just call it what it is. Republicans are able to do it easier.

Senator LEAHY. Well, Republicans, of course, do not have to show up to vote. [Laughter.]

Unless forced to. But I suspect you all collect your pay for the week, though.

Senator HATCH. That is unless we are arrested by the Banana Republic-type approach that Democrats seem to have today.

Senator LEAHY. We just want you to be sure to be there to do what you are paid for, Orrin. That is all.

Senator HATCH. That is right. We are there on the votes, but quorum calls are not real votes as far as we are concerned.

Senator LEAHY. I do not know about that.

I will hold my tongue on that last remark. This morning the Judiciary Committee will hold its 21st hearing in this Congress to consider nominations to the lower Federal courts. I mention that number because it may have escaped the notice of the Justice Department.

Today, we will take further testimony on the nomination of Bernard Siegan to be U.S. Circuit Judge for the Ninth Circuit. Professor Siegan testified before this committee last November, I believe it was, Professor.

Mr. SIEGAN. Yes.

Senator LEAHY. This hearing has been scheduled to give him an opportunity to respond to questions from Senators who were not able to attend the November hearing.

This nomination has excited a great deal of controversy.

The nomination has its distinguished supporters and its distinguished opponents. Once every Senator who wishes to do so has had the opportunity to question the nominee, the committee will decide what testimony from public witnesses would be most valuable to us in carrying out our duties to the Senate, to the constitutional process of advice and consent and to the American people.

In the meantime, I will order the following materials placed in the hearing record which reflect the range of views on this nomination: 30 letters from individuals and organizations in opposition to the nomination; 17 letters from individuals and organizations in support of the nomination; two reports in opposition to the nomination, one signed by 33 organizations and the other endorsed by 6 organizations and 7 experts in the field of environmental law.

[The information of Senator Leahy follows:]

Letters Submitted to the Record Regarding the Nomination of Bernard Siegan

OPPOSED

Shirley M. Hufstedler, Attorney, Los Angeles, California. Former Judge, Ninth Circuit Court of Appeals.

Laurence H. Tribe, Professor, Harvard Law School.

Pamela C. Sellers, President, Women Lawyers' Association of Los Angeles.

Mike Lewis, Washington Representative, International Longshoremans and Warehouseman's Union.

Suzanna Sherry, Professor of law, University of Minnesota Law School.

Mr. Kenneth F. Melley, Director of Government Relations, National Education Association

Beth Wray, National President, Business and Professional Women's Clubs, Inc. U.S.A.

Theodore R. Mann, President, American Jewish Congress.

Laurence D. Downing and H. Donald Harris, Jr. Presidents, Sierra Club and Sierra Club Legal Defense Fund.

George T. Frampton, Jr., President, The Wilderness Society.

W. Michael Litaker, Pastor, Pilgrim Congressional Church.

John V. Stevens, Sr., President, Council on Religious Freedom.

Sarah Harder, President, American Association of University Women.

John P. Wilson, Dean, Golden Gate University School of Law.

Stephanie Kessler, Executive Director, Alaska Center for the Environment.

Patti J. Sanders, Acting Executive Director, Trustees for Alaska.

San Francisco Lawyers' Committee for Urban Affairs.

Henry R. Richmond, Executive Director, 1000 Friends of Oregon

OPPOSED (continued)

Albert A. Meyerhoff, Senior Staff Attorney, Natural Resources Defense Council

Stewart C. Kwoh, Executive Director, Asian Pacific American Legal Center

Hoyt H. Zia, President, Asian Pacific Bar of California

Robert M. Kawahara, President, Japanese-American Association of the Greater Los Angeles Area

Curtis R. Namba, President, American Bar Association of Sacramento.

Sandra J. Chan, President, Southern California Chinese Lawyers' Association.

Washington Legal Workers Union

Rosendo Pena, Jr., President, La Raza Lawyers Association

Maxwell M. Blecher, Attorney, Los Angeles, California

Mark A. Pearl, National Director, Americans for Democratic Action, Inc.

Abby Ginzburg, President, San Francisco Bay Area Chapter, National Lawyers Guild.

Kate Michelman. Executive Director, National Abortion Rights Action League.

IN FAVOR

Sheldon Krantz, Dean, University of San Diego School of Law.

Richard J. Wharton, Director, Environmental Law Clinic, University of San Diego School of Law

Virginia Shue, Professor, University of San Diego School of Law.

Robert L. Simmons, Professor, University of San Diego School of Law.

Michael J. Navin, Professor, University of San Diego, School of Law.

William Kai-Sheng Wang, Professor, Hastings College of the Law.

Julian H. Levi, Professor, Hastings College of the Law.

Arthur Brody, Professor, Southwestern University School of Law.

Jack M. Siegel, Attorney, Chicago, Illinois.

Milton V. Freeman, Attorney, Washington, D.C.

James M. Buchanan, General Director, Center for Study of Public Choice, George Mason University.

Milton Friedman, Senior Research Fellow, Hoover Institute.

Alan M. Dershowitz, Professor, Harvard Law School

Phillip B. Kurland, Professor, University of Chicago Law School

Michael Pancer, Attorney, San Diego, California.

Ernest Gellhorn, Attorney, Washington, D.C.

Leo T. Maher, Bishop of San Diego

Hufstedler
Miller
Carlson &
Beardsley

February 17, 1988

Honorable Joseph Biden, Jr.
United States Senate
S.H. 703
Second Street and Constitution Avenue
Washington, D.C. 20510-6275

In Re: Nomination of Mr. Bernard H. Siegan

Dear Senator Biden:

I write in opposition to the confirmation of Mr. Siegan as judge of the United States Court of Appeals for the Ninth Circuit.

I do not know Mr. Siegan personally. My acquaintance with him is limited to my reading substantial parts of his published works, his testimony before the Senate Judiciary Committee, and the responses to the Questionnaire for Judicial Nominees. From those sources, I have formed the opinion that Mr. Siegan is not qualified to sit on the United States Court of Appeals.

During his years of private practice, Mr. Siegan specialized in land development. His litigation experience, even in the area of his specialty, was extremely modest. He did not participate in any federal litigation, with the exception of one appearance in a federal court when he worked for a law firm shortly after leaving law school. He did not further describe the occasion, but, by his own account, his appearance in federal court was not "of any significance" (R.T. 32). The last time he appeared in a federal court was "possibly" 36 years ago. (Ibid.) He has never been admitted to practice in any federal appellate court.

Nothing in Mr. Siegan's record suggests that, before his nomination, he had any interest in the work of the United States Courts of Appeals. His interest in litigation has been minimal. Instead, the record indicates very strongly that he is not acquainted with the docket of the Ninth Circuit, the responsibilities of a judge of that Court, or the fields of law in which that Court regularly adjudicates. Mr. Siegan's interests, throughout his career, have been in land development, zoning, some aspects of economics, and his philosophical views of some of the decisions of the United States Supreme Court.

Mr. Siegan has testified before the Committee that his "thinking is totally irrelevant" to the decisions that he would make as a judge. (R.T. 60). As a United States Circuit Judge, he would look at the fact situation before me and look up the cases and try to decide how the Supreme Court would hold in a particular case. The purpose here as an appeals court judges [sic] is to carry out the will of the Supreme Court and ...." (R.T. 60-61). "If a case comes up involving economic liberties, I think as a judge I would feel it is my obligation to say that is not protected here; there is nothing I can do for you. If you need help, go see the legislature." (R.T. 70-71.)

In discussing how he would approach a case involving legislation concerning the safety of underground miners, Mr. Siegan responded:

> "I would, as a legal researcher, as a legal analyst, look to what the Supreme Court has said in that particular situation.... I would try to write an opinion that would be upheld by the U.S. Supreme Court.... Appeals Court judges ... basically have to be consistent with what the Supreme Court says. So what purpose would it be for an appeals court judge to write an opinion which will be thrown out by the Supreme Court? Now, it is true not all the cases come up to the Supreme Court, but many of them do.... I would not dream of imposing my will over that of the U.S. Supreme Court." (R.T.71-72)

These responses clearly indicate that Mr. Siegan does not understand judicial opinion writing and the reality of Supreme Court review of decisions from Courts of Appeals. The Supreme Court grants hearings in fewer than two percent of the

cases decided by all the Courts of Appeals combined. Very few cases in the Ninth Circuit can be resolved by finding a similar set of facts in a Supreme Court case and following the holding in that case. The bulk of the docket is made up of cases presenting far more vexing problems, requiring the application of legal principles drawn from many cases, none of which presents the same factual picture or the identical issue upon which the Supreme Court has spoken.

Except in the field of criminal law and procedure, the cases before the Ninth Circuit usually concern questions upon which the Supreme Court has not spoken at all or has spoken only indirectly. As a judge, Mr. Siegan could not find the "answers" to the innumerable hard questions before the Ninth Circuit solely from examining Supreme Court authority, or prior decisions of the Ninth Circuit, or explicit directions in the legislative history, although all of such sources are regularly consulted. Although all judges of the Ninth Circuit must follow the law as decided by the Supreme Court, that task is the least difficult. (Indeed, very few civil cases are even appealed if the Supreme Court has clearly decided the dispositive issue.)

Mr. Siegan has not indicated any awareness of the cases reaching the Court of Appeals from Federal District Courts based on diversity jurisidiction. In those cases, the law of the States must be applied. The Supreme Court does not speak at all on state law unless the state law is subject to constitutional challenge.

The overwhelming majority of cases on the docket of the Ninth Circuit do not involve the subjects in which Mr. Siegan has had any experience. Almost half the caseload is criminal. Mr. Siegan has had no revealed interest and no experience in criminal jurisprudence. Cases involving issues of land development are a very small (even infinitesimal) part of the docket. The fields of law considered by the Ninth Circuit are extraordinarily varied and often very complex. Nevertheless, federal jurisdiction and procedure, and errors in trials are intimately and constantly before the Court. Mr. Siegan's work, both as a practitioner and a law teacher has had nothing to do with these subjects.

When Mr. Siegan states that his economic, social, judicial and political philosophy would not be relevant to his work as a circuit judge, he has revealed his lack of appreciation of the work of a circuit judge. The Ninth Circuit is constantly interpreting federal legislation; it is rare that such legislation has no economic effect on both public and private interests.

Interpretation and application of federal statutes does not rest alone on the language of its legislative history and Supreme Court decisions. Rather, the Ninth Circuit must frequently decide legislative intent when that intent has not been clearly expressed or when Congress did not contemplate the circumstances in which the legislation must be applied and when the Supreme Court has said nothing about the statute. The individual's philosophy inevitably influences his or her decision to read the legislation expansively or restrictively in applying that legislation to particular facts. Mr. Siegan has expressed strong views that, on "socioeconomic matters," statutes that do not represent majoritarian will are illegitimate, that legislators do not have enough knowledge "to create efficient and effective statutes," and that these deficiencies in legislative process warrant denial of judicial deference to the legislative will. He would shift to the Government a heavier burden of proof to uphold statutes affecting economic interests than has been acceptable for more than fifty years. (Siegan, Economic Liberties in the Constitution, 315-331 (1980).)

Throughout his published works, Mr. Siegan has consistently elevated private economic interests above the public interests in environment, health and safety, aesthetic concerns and other competing social interests. His "libertarian" philosophy is a radical departure from very well established principles of law stated by the Supreme Court and by the Ninth Circuit over a period of many decades.

Mr. Siegan's views on civil rights issues are also extreme. He declines to accept that the draftsmen of civil rights statutes and of the Fourteenth Amendment deliberately adopted capacious, abstract language to permit the concepts of protected human rights to develop over time. Apparently recognizing that his crabbed interpretation of the Fourteenth Amendments and of the Civil Rights Acts would illegitimate Brown v. Board of Education, he has expressed to this Committee the extraordinary view that dismantling racial apartheid, while unsupportable under the Fourteenth Amendment, could be sustained by the constitutional right to travel. His shrinkage of the reach of the Equal Protection Clause and his expansion of a constitutional right of travel are bizarre. Not only does he disagree with the interpretation of the Equal Protection Clause endorsed by the Supreme Court and by an overwhelming majority of constitutional scholars, he has failed to explain how he can reconcile his interpretation of the Equal Protection Clause with his expansive acceptance of a constitutional right of travel. A right to travel does not expressly appear in the Constitution.

Does Mr. Siegan believe that protecting voting rights depends on a constitutional right to travel to the polls?

As the Committee knows, a circuit judge is simply not one among many judges on a large collegial court. Circuit courts sit in panels of three judges, with occasional exceptions for hearings en banc. Again and again, his vote would be the decisive vote on a 3-judge panel, and 98 percent of the time that decision will be final, not only as to the litigants in that case, but to innumerable persons who will be bound by the law in that case who are not parties.

Mr. Siegan has enjoyed success as an academic philosopher, a real estate owner and developer. Unfortunately, neither his training nor his experience has prepared him for the tasks that face a circuit judge.

Sincerely,

Shirley M. Hufstedler

SMH:sh
cc: Honorable Edward Kennedy

HARVARD UNIVERSITY
LAW SCHOOL

LAURENCE H. TRIBE
Ralph S. Tyler, Jr. Professor of Constitutional Law

GRISWOLD HALL 307
CAMBRIDGE, MASSACHUSETTS 02138
(617) 495-4621

JUDICIARY COMMITTEE
JUN -2 AM 10:53

May 28, 1987

The Honorable Joseph R. Biden, Jr.
Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Joe:

I am writing in response to your letter of May 11, 1987, requesting my assistance as the Senate Judiciary Committee reviews Bernard Siegan's nomination to the United States Court of Appeals for the Ninth Circuit.

I have read Mr. Siegan's two books, Economic Liberties and the Constitution (1980) and The Supreme Court's Constitution (1987), with a view to understanding his jurisprudence on fundamental constitutional issues, keeping in mind the perspective set forth in your November 1985 Ryan Lecture at Georgetown Law School. I take that lecture to mean that, in your view, the Senate should impose no ideological test but should check the excesses of Presidents by assuring that their judicial nominees come from the mainstream of American jurisprudence and not represent radical revisionism of a sort that would reverse a half-century of progressive interpretation of the Civil War Amendments. I share that view. My conclusion is that Mr. Siegan fails the test you set forth.

The thrust of Siegan's two books, and of his other writings, is to elevate contract and property to a constitutional pinnacle they have not occupied since the Supreme Court wisely rejected the Lochner philosophy in 1937 -- and to reduce the equality principle of the Civil War Amendments to a pale shadow of what the authors and ratifiers intended, what the language plainly mandates, and what the past fifty years of federal judicial decisions confirms.

By essentially endorsing the use of the Constitution to invalidate such social welfare measures as minimum wage legislation, Mr. Siegan reveals himself to be not a judicial conservative but an ideologue of the right -- one who would deploy the Constitution in the service of a conservative economic philosophy. And by denying that the Fourteenth Amendment secures fundamental rights to such things as integrated public education, Mr. Siegan allies himself with those who have resisted the Constitution's guarantees of racial equality despite the Civil

War and the basic changes it wrought in our constitutional scheme.

Perhaps the most telling illustration of Mr. Siegan's radical revisionism is his conclusion that, because "the fourteenth amendment accepted segregation in contemporary public educational facilities," the Supreme Court's landmark ruling in Brown v. Board of Education cannot be supported as a decision enforcing the equal protection of the laws. Reluctant to repudiate Brown outright, Mr. Siegan advances the tortured argument that the right of black children vindicated by that ruling was "a component of the right to travel, a right long secured by the federal courts." The Supreme Court's Constitution, pg. 106. The notion that it is a black child's freedom to "travel" onto the schoolgrounds that segregation laws infringed is so bizarre and strained -- so incompatible with meaningful enforcement of the right to integrated education and so at odds with ordinary ways of thinking about constitutional law -- as to bring into question both Mr. Siegan's competence as a constitutional lawyer and his sincerity as a scholar. At the very least, anyone who must strain so hard to find justification for the Supreme Court's ruling in Brown must be regarded as far outside any plausible definition of the jurisprudential mainstream.

Based on the evidence summarized here, I am confident that Mr. Siegan is unfit to serve as a federal judge -- even by standards that give wide latitude to the President as the nominating authority.

Please do not hesitate to call upon me for further help, on this appointment or on any other.

Sincerely,

Laurence Tribe

Laurence H. Tribe

LHT:lks

HARVARD UNIVERSITY
LAW SCHOOL

LAURENCE H. TRIBE
Ralph S. Tyler, Jr. Professor of Constitutional Law

GRISWOLD HALL 307
CAMBRIDGE, MASSACHUSETTS 02138
(617) 495-4621

April 19, 1988

The Honorable Joseph R. Biden, Jr.
Chairman
Senate Judiciary Committee
Russell Senate Office Building
Room 489
Washington, D.C. 20510

Dear Joe:

I am writing with regard to the nomination of Bernard Siegan to the United States Court of Appeals for the Ninth Circuit. As you may recall, I wrote a letter dated May 28, 1987, opposing that nomination in response to your request for my assistance on the issues the nomination presented. Although my ultimate recommendation continues to be negative, the additional thought I have given the matter in the intervening months has led me to conclude that my May 28 letter put my negative views more strongly than the record warranted and may have made the case seem clearer than it is. In fairness to Professor Siegan and the Committee, I must therefore write this follow-up letter.

After further reflection on the two books written by Professor Siegan, I have come to believe that his views with respect to economic liberty, although sharply different from my own and from those held by the Supreme Court over the past half-century, are not quite as extreme as they had seemed to me on first reading and create less danger than I initially supposed of returning the federal judiciary to the worst excesses of the Lochner era.

I believe, moreover, that Professor Siegan's views of Brown v. Board of Education and its progeny, although very far from my own, are considerably less hostile to constitutional protections for racial equality than they initially seemed to me to be.

Finally, in my original letter, I discussed Professor Siegan's argument that the school desegregation ruling ought to have been grounded in the constitutional "freedom to travel," and that official segregation interfered less with equality than with liberty of access. I called that argument "so bizarre and strained . . . as to bring into question both Mr. Siegan's competence as a constitutional lawyer and his sincerity as a scholar." I continue to find his argument, and the analysis surrounding it, peculiar and unconvincing, and I am not impressed by his effort to elaborate upon it in his latest written

submission to this Committee, of which I received a copy yesterday. Nonetheless, it now seems to me excessive to describe the Siegan analysis as so strange that either his basic competence or his good faith should be questioned.

I should add that I cannot credit Professor Siegan's suggestion, both in his testimony before this Committee and in his most recent written submission, that his philosophy is rendered largely irrelevant by the fact that he has been nominated only to a lower court. There is a great deal of room for the exercise of judgment in how federal appellate courts understand Supreme Court precedent, and it cannot be credibly maintained that the views of a nominee to a circuit court do not matter much. Indeed, Professor Siegan's testimony to that effect might justifiably give pause even to a Senator who was otherwise prepared to support his nomination.

On balance, I do continue to find Professor Siegan's constitutional arguments and approaches most troubling but regret the stark and conclusory nature of my earlier statement that he is "unfit to serve as a federal judge." Having reviewed his work, his latest submission, and the statements submitted by others regarding his nomination, I believe that there is much to be said in support of Professor Siegan as an individual and that, if I were charged with the responsibility of passing upon his nomination rather than that of expressing initial reactions, I would come to a more measured view than the one I originally voiced, even though my bottom line would still be a negative one.

Whatever weight my views are likely to carry in light of the array of opinions and forces already brought to bear on this nomination, I believe it necessary to set the record straight, rather than to leave my prior statement standing without the correction I have concluded was required.

Sincerely,

Larry Tribe

Laurence H. Tribe

cc: Professor Bernard Siegan

WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES

P.O. Box 480197, Los Angeles, CA 90048-1197 Telephone 213-653-3325
Office of:

January 29, 1988

Senator Joseph R. Biden, Jr.
Chairman, Senate Judiciary Committee
224 Senate Dirksen Office Bldg.
Washington, D.C. 20510

Attn: Diana Huffman

Re: Opposition to Nomination of Bernard Siegan

Dear Senator Biden:

Women Lawyers' Association of Los Angeles, an organization of over 1,000 attorneys, judges and second and third year law students, male and female, urges you to oppose the nomination of Bernard Siegan to the Ninth Circuit of the U.S. District Court of Appeals. As you are no doubt aware, Los Angeles County falls within the jurisdiction of the Ninth Circuit so any appointment to that court is of particular concern to us.

We were heartened by the position you and your colleagues took in blocking the nomination of Judge Bork, and hope that you will look as closely at this nominee.

Siegan has appeared before you already, so you are aware of his legal credentials. We believe they are insubstantial for so important a position as that of federal appeals court judge, especially in as active a district as the Ninth Circuit.

Not only does WLALA oppose Siegan because he is unqualified, it opposes him because many of his views are unacceptable. His opinion, for example, that the Equal Protection Clause of the 14th Amendment does not prohibit states from discriminating against minorities and women in education, jury service, voting and office holding is not only contrary to existing law, but abhorant. As is his view that Brown v. the Board of Education was decided for the wrong reasons and that almost every Supreme Court decision enforcing Brown was unjustified.

WLA

OFFICERS 1987-88

President
Pamela C. Sellers
4250 Wilshire Blvd.
Suite 207
Los Angeles, CA 90010
(213) 931-2881

President-Elect
Lorraine L. Luder

First Vice President
Frances Wender Kandel

Second Vice President
Susan J. Troy

Secretary
Sally Suchil

Treasurer
Patricia M. Schnegg

Advisory Council
Sheila James Kuehl

Executive Director
Jenifer McKenna

COMMITTE AND SECTION CHAIRS

Elayne Berg-Wilion
Linda Berler
Kristine Blackwood
Robin Bodiford
Linda Willett Brackins
Alison Colgan
Deborah Chodos
Jacqueline M. Fabe
Sandra S. Faithfull
E. Jean Gary
Hon. Rose Hom
Cheryl Houser
Julia Beyer Houpt
Nancy E. Howard
Rebecca Hufford-Cohen
Jewell Jones
Michelle Katz
Katharine Krause
Sherrill Kushner
Vicki E. Land
Pearl Lattaker
Kelly M. Martin
Julia M. Metzger
Patricia Mitchell
Linda Northrup
Mary V. O'Hare
Megan G. Orlando
Wendi G. Royal
Fern Topas Salka
Susan R. Schwartz
Lynn Soodik
Maria E. Stratton
Jill Switzer
Dawn Tilman
Phyllis Alden Truby
Jacqueline L. Trzaska
Kim McLane Wardlaw
Mary A. Zachar

Siegan also believes that the Supreme Court has been wrong in upholding a substantial amount of health and safety legislation and he has criticized the minimum wage laws, toxic related legislation and other forms of economic regulation. According to the New York Times, even Judge Bork disagrees with Siegan's view that government economic regulations should be regarded as presumptively unconstitutional.

We believe that the same arguments which ultimately caused your committee to oppose Judge Bork's nomination require you to defeat Siegan. He is, if anything, more extreme in his views, and as the last debate made clear, the courts are no place for idealogues.

WLALA requests the opportunity to present oral testimony at the Judiciary Committee's public hearings.

Very truly yours,

Pamela C. Sellers
President

INTERNATIONAL —— WASHINGTON OFFICE —— LONGSHOREMEN'S & WAREHOUSEMEN'S UNION

1133 - 15TH STREET N.W. WASHINGTON, D.C. 20005 • (202) 463-6265

JAMES R. HERMAN
President

RUDY RUBIO
Vice President

CURTIS McCLAIN
Secretary-Treasurer

December 3rd, 1987

Hon. Joseph Biden
Chairman, Senate Judiciary Committee
212 Dirksen Office Building
Washington, D.C. 20510

Dear Mr. Chairman,

On behalf of ILWU, I am writing to request an opportunity to testify at the second confirmation hearing you will schedule in the near future on the nomination of Bernard Siegan to the Ninth Circuit Court of Appeals.

From what is already known about Mr. Siegan's views on civil rights, and on the powers of the federal government and of the federal courts, ILWU strongly opposes his confirmation. We hope the Judiciary Committee will give this nomination the close scrutiny it deserves.

Sincerely

Mike Lewis

Mike Lewis
Washington Representative

UNIVERSITY OF MINNESOTA
TWIN CITIES

Law School
285 Law Center
229 19th Avenue South
Minneapolis, Minnesota 55455
(612) 625-1000

(612) 625-2339

November 6, 1987

Senator Joseph Biden
Senate Judiciary Committee
Washington, D.C. 20510

Dear Senator Biden:

I would like to request an opportunity to testify against the confirmation of Professor Bernard H. Siegan to the United States Court of Appeals for the Ninth Circuit.

I am a tenured associate professor of law at the University of Minnesota Law School, with a J.D. from the University of Chicago Law School. I have considerable expertise in the area of constitutional history, and especially the history of the founding period of 1787-1791. I have written two lengthy law review articles on the subject, and am currently working on a textbook and a third article. I have also written three other articles on other constitutional law topics. I have taught Constitutional Law for the past five years, and I am teaching it again this semester. I am also currently teaching a legal history seminar on the writing and ratification of the Constitution; I have taught this seminar before as well.

I have done preliminary research on Professor Siegan's historical analysis of the intentions of the framers of the Constitution. I have concluded that the portion of Professor Siegan's historical writing that I have examined is highly one-sided and misleading, and apparently designed to further a political agenda rather than to broaden historical knowledge and understanding.

In view of my observations about the quality of Professor Siegan's scholarship, I have serious concerns about whether he possesses the requisite professional competence to be a Court of Appeals judge.

Please advise me of the date on which you wish me to testify. I should advise you that it would be impossible for me to testify during the next several weeks. My teaching duties

and several previous scholarly obligations would prevent me from preparing any testimony during that time. Additionally, in light of the very recent publication of Professor Siegan's new book, I would appreciate additional time to study this further example of Professor Siegan's scholarship.

I recognize that testimony need not be given in person. I would prefer to testify in person, however, in order to give your committee an opportunity to ask questions about my examination of Professor Siegan's historical writings, especially in light of the seriousness of the issues.

Thank you in advance for your consideration. I look forward to hearing from you.

Sincerely,

Suzanna Sherry
Professor of Law

SS:mcb

GOVERNMENT RELATIONS
Kenneth F. Melley, Director

NATIONAL EDUCATION ASSOCIATION • 1201 16th St., N.W., Washington, D.C. 20036-3290 • (202) 822-7300

MARY HATWOOD FUTRELL, President
KEITH GEIGER, Vice President
ROXANNE E. BRADSHAW, Secretary-Treasurer

DON CAMERON, Executive Director

December 22, 1987

The Honorable Joseph R. Biden
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing on behalf of the 1.86 million-member National Education Association to express our strong opposition to the nomination of Mr. Bernard Seigan for the Ninth Circuit Court of Appeals. We urge the Judiciary Committee to reject this nomination.

In numerous articles, speeches, and books, Mr. Seigan has criticized and attacked the role of the Supreme Court and the judiciary in general, and decisions in such major areas as school desegregation, civil rights, separation of church and state, and freedom of speech. His restrictive, indeed bizarre views of the Constitution and the courts clearly should disqualify him from serving on the Ninth Circuit.

In his 1987 book, The Supreme Court's Constitution: An Inquiry into Judicial Review and Its Impact on Society, Transaction Books, 1987 (hereinafter SCC), Mr. Seigan stated " . . . the court has frequently ruled either contrary to, or without guidance from, constitutional meaning and purpose. It has been more the maker than the interpreter of law" (p. x). Mr. Seigan favors a "strict constructionist solution to interpretation (which) is precise, uncompromising, and best implements neutral principles" (SCC, p.xi).

The following are some specific areas where Mr. Seigan's views are extremely disturbing.

1. School Desegregation - Mr. Seigan believes that Brown v. Board of Education, 349 U.S. 294 (1954), was wrongly decided and that Supreme Court decisions enforcing Brown are unjustified. In fact, Mr. Seigan wrote in 1985 that desegregation cases were "the most flagrant example" of the Court's overstepping its role ("The Supreme Court: The Final Arbiter," in Beyond the Status Quo:, Policy Proposals for America, Cato Institute, Wash, D.C. (1985) p.17-18). He believes the Equal Protection Clause of the 14th Amendment protects only against discrimination in natural rights (life, liberty, and property) and not "political rights" such as education,

voting, jury service -- all contrary to numerous Supreme Court decisions.

While Mr. Seigan believes the Court could have rejected segregated schools based on a "right to travel," he does not feel the Court can issue any remedies to dismantle such segregation. In The Supreme Court's Constitution he states, "Although such segregation is totally repugnant in modern society, it does not follow that the constitution necessarily provides relief in this area" (p.106).

2. Civil Rights - Contrary to established precedents, Mr. Seigan would apply a cost-benefit analysis in deciding people's civil rights. He basically believes that the Court should consider economic costs to society or government before overturning discriminatory legislation.

Speaking of Weinberger v. Weisenfeld, 420 U.S. 636 (1975), a unanimous Supreme Court decision striking down gender-based distinctions in Social Security, Seigan has written, " . . . when figures of this magnitude are revealed, the case can no longer be regarded as confined to the settling of gender equities . . . A definitional equality in gender is being protected at a price -- possibly a very significant one." He went on to say that the Court's rulings in the area were "morally as well as legally objectionable" (SCC, p.141).

In another instance, he wrote in 1979 that Title VII of the Civil Rights Act "joins the long list of government programs whose principal accomplishment is the imposition of higher prices and the acceleration of inflation" ("Future of Anti-Discrimination," Orange County Register, January 28, 1979).

3. Separation of Church and State - Mr. Seigan's position is that the Establishment Clause of the First Amendment was not incorporated by the Fourteenth Amendment to cover the states and therefore does not limit a state's ability to promote or advance religion. He also supports state-sponsored school prayer and has written that schools are not "neutral . . . centers of learning without partisanship toward any dogma or doctrine," but that teachers are furthering "general tenets of Humanism" (SCC p. 128). He goes on to say that "'Neutrality' in the classroom, it seems, requires, rather than rejects, some traditional religious input" (SCC p. 130).

Thus, Mr. Seigan disagrees with 40 years of Supreme Court decisions dating back to Everson v. Board of Education, 330 U.S. 1 (1947), which held that the establishment clause applied to the states and prohibited states from aiding or supporting religious activities or institutions.

4. Health and Safety Laws - Mr. Seigan in this area is a strong judicial activist, believing the courts should have broad power to strike down laws concerning economic regulation in such areas as health and safety, environmental protection, and working conditions. In fact, he has written in another book that "Because of its

limitations and infirmities, the legislature should not be the final authority in socioeconomic matters" (Economic Liberties and the Constitution, University of Chicago Press 1980, p.321, hereinafter EL&TC).

He thinks the last 50 years of Supreme Court decisions in these areas were wrongly decided and that Lochner v. New York, 198 U.S. 45 (1905), which struck down a statute limiting the number of hours bakers could work, is the proper interpretation of the Constitution.

Consequently, he has endorsed positions taken by the Court in 1908 and 1915 (Adair v. U.S., 208 U.S. 161 (1908), Coppage v. Kansas, 236 U.S. 1 (1915)) that supported employer economic rights over employee associational rights by allowing employers to fire employees who joined unions. Mr. Seigan argues that "union policies encouraged inefficiency" (EL&TC, p.124).

In fact, Mr. Seigan goes so far as to challenge McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), which recognized Congress' broad powers under the "necessary and proper" clause of the Constitution. He writes that Chief Justice Marshall's opinion was "questionable" (SCC, p.13).

Similarly he has opposed numerous environmental laws, saying that the Clean Air Act is " . . . probably the grossest example of a law passed on the basis of half truths." ("Costly Half Truths," County Register, February 29, 1976).

5. Freedom of Speech - Mr. Seigan argues that the First Amendment does not prohibit either the executive or judicial branches from curtailing free speech, stating "The language clearly restrains only Congress and no other branch or institution" ("Altering the Constitution," Orange County Register, March 25, 1987). He believes the Supreme Court was wrong in stopping the Nixon Administration's attempts to prevent publication of the Pentagon Papers, 403 U.S. 713 (1971).

In order to present these views in more detail before the Committee, I respectfully request the opportunity for NEA to testify during additional hearings the committee is planning to hold on this nomination.

Sincerely,

Kenneth F. Melley
Director of Government Relations

KFM/mew

cc: Members, Senate Judiciary Committee

BPW USA

The National Federation of Business and Professional Women's Clubs, Inc. of the United States of America

2012 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 293-1100

January 4, 1988

Honorable Joseph Biden
Chair, Senate Judiciary Committee
Russell Office Building, SR-489
First and C Streets, N.E.
Washington, DC 20510

Dear Senator Biden:

On behalf of the National Federation of Business and Professional Women, Inc. (BPW), I am writing to express the opposition of BPW's membership to the pending nomination of Bernard H. Siegan to the United States Court of Appeals for the Ninth Circuit and to request the opportunity to testify at the hearings on his confirmation.

BPW is the oldest and largest professional women's organization in the United States. Our members are business and professional people in every state, the District of Columbia and the Virgin Islands. Since 1919, BPW has worked to improve educational, work and other opportunities for women. We oppose Professor Siegan's nomination because we believe that his strongly held views, which are inconsistent with well established judicial precedents, could jeopardize women in their employment, education, businesses and private lives.

As a judge on the Ninth Circuit, Professor Siegan would review cases raising significant questions of constitutional law. From his writings criticizing the Supreme Court's decisions regarding economic regulation, equal protection, due process and the First Amendment, we question whether, as a judge, Professor Siegan would follow well-established precedents. His failure to follow Supreme Court decisions would deprive judicial relief to women seeking access to educational and employment opportunities and enhancement of their roles as professionals and citizens. Moreover, Professor Siegan's view that judges should not order affirmative relief would remove effective remedies in many cases.

Professor Siegan has also written of the need for judges to scrutinize more closely economic regulation. Not only would the analysis he suggests be inconsistent with the approach taken by federal judges for fifty years, it would substitute judicial decisionmaking for legislative determination on important social and economic issues. While professor Siegan criticizes judicial activism in general, he prescribes a very active role for judges in "protecting" economic liberty. Such judicial intrusion is not only inappropriate, it could jeopardize legislation and regulations which protect women and minorities pursuing educational opportunities or entering employment

and small businesses entering markets that would otherwise be foreclosed; protect worker health and safety; protect consumers from unsafe products; and protect businesses from unfair competition. This risk to such important legislation is not acceptable.

We look forward to providing additional comments in testimony during the confirmation hearings and await your reply to your request to testify.

Sincerely,

Beth Wray

Beth Wray
National President

AMERICAN JEWISH CONGRESS

STEPHEN WISE CONGRESS HOUSE • 15 EAST 84TH STREET • NEW YORK, N.Y. 10028 • (212) 879-4500

OFFICE OF THE PRESIDENT

November 19, 1987

The Honorable Joseph Biden Jr.
United States Senate
Washington, DC 20510

Dear Senator Biden:

On behalf of the American Jewish Congress I urge you to oppose the nomination of Bernard Siegen to serve on the U.S. Court of Appeals for the Ninth Circuit. Mr. Siegen's views on the central meaning of the Constitution and the role of the judiciary in enforcing it, as expressed in his writings, are sharply at variance with mainstream judicial and scholarly thought in a number of crucial respects.

In Mr. Siegen's view, the principle purpose of the Constitution is to shield economic activity from interference by the government and deny any role to the Constitution and the judiciary in safeguarding this nation's most cherished ideals. In denigrating the significance of the constitutional guarantee of freedom of expression, for example, he has written that the framers of the Fourteenth Amendment "were much more concerned about the right of property than of expression. In contemporary times, the high court has reversed this priority." Mr. Siegen believes that Brown v Board of Education, which outlawed racial segregation in the schools, was improperly grounded on the right of equal protection: he propounds instead the bizarre notion that it should have been decided on the basis of the constitutional right to travel. In keeping with this view, he would deny the federal courts use of their traditional equitable powers in enforcing the decision, relying instead on discredited "freedom-of-choice" plans.

Mr. Siegen is a judicial activist in the most extreme sense, advocating judicial nullification of economic legislation that, in the view of a court, is not economically efficient. He has explicitly recommended "full rehabilitation" of the doctrine of judicial nullification associated with Lochner v New York, which ranks with the Dred Scott decision and Plessey v Ferguson as among the Supreme Court's most thoroughly discredited rulings. Mr. Siegen adopts an equally untenable position with regard to the constitutional guarantees of religious freedom. He has questioned the

propriety of the Supreme Court's application of the Establishment Clause against the states through the Due Process Clause of the Fourteenth Amendment. In the name of "neutrality," he has called for a return of religious prayer to the classroom as a counterweight to "New Humanism."

Mr. Siegen's nomination for a federal judgeship is an attack on mainstream constitutional jurisprudence and a denial of the accepted meanings of the Constitution. His confirmation would signal a retreat from the ideals of equal justice and religious tolerance, and a denial of the central meaning of the Constitution. I urge you to vote against his confirmation.

Sincerely,

Theodore Mann

Theodore R. Mann
President

SIERRA CLUB

SIERRA CLUB
LEGAL DEFENSE FUND, INC.

February 12, 1988

The Honorable Patrick J. Leahy
The United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

The Sierra Club, a 435,000-member national environmental organization, and the Sierra Club Legal Defense Fund, an environmental law firm, urge you to vote "no" on the confirmation of Bernard Siegan to be a judge on the United States Court of Appeals for the Ninth Circuit.

The Sierra Club and the Sierra Club Legal Defense Fund exist to defend the natural resources and public health of this country and its citizens. We use the courts extensively to ensure that environmental and land use laws -- including the laws you pass -- are faithfully and diligently carried out.

Our opposition to Mr. Siegan's confirmation is based on his extremely narrow view of the power of local governments to regulate land use, growth, and the environment. Mr. Siegan views such regulation as a constitutional "taking" of private property that requires compensation from the local government, except when the regulations are "truly necessary to protect public health, safety, morals or welfare." Should his view become law, the result would be the end of local zoning, land use, and environmental protection measures as we now know them. Local governments surely would not be willing to risk the vast sums of money required to pay for a "taking" under Mr. Siegan's radical new constitutional test.

We urge you to review closely Mr. Siegan's land use and environmental record as outlined in the enclosed report by the Center for Law in the Public Interest. If you have questions about it or wish further information about Mr. Siegan and environmental law, please contact Durwood Zaelke of the Sierra Club Legal Defense Fund, at 202/667-4500, or the Sierra Club's Legislative Director, David Gardiner, at 202/547-1141.

After reviewing the information, we strongly urge you to join us in helping to preserve the power of local governments to continue regulating land use and the environment by actively opposing the confirmation of Mr. Siegan.

Respectfully submitted,

Lawrence D. Downing, Esq.
President,

For the Board of Directors
SIERRA CLUB

H. Donald Harris, Jr., Esq.
President,

For the Board of Trustees
SIERRA CLUB LEGAL DEFENSE FUND

Enclosure

THE WILDERNESS SOCIETY

GEORGE T. FRAMPTON, JR.
PRESIDENT

February 10, 1988

Honorable Joseph R. Biden, Jr.
Chairman, Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Bernard Siegan to the Ninth Circuit Court of Appeals

Dear Mr. Chairman:

On behalf of The Wilderness Society, I want to express our opposition to the nomination of Bernard Siegan to the Ninth Circuit Court of Appeals. To my knowledge this is the first time The Society has ever become involved in a judicial nomination, but we feel compelled to do so in this unusual case because of Mr. Siegan's extreme views on environmental regulation and on the validity of land-use planning techniques, including zoning, which have been used for many decades by state and local governments, and have long been accepted by state and federal courts.

The Wilderness Society is a 200,000 member national environmental organization devoted to the preservation and proper management of the nation's federal lands -- over one-quarter of the land base of the United States. Wise management of these lands and publicly-owned natural resources requires rational land-use planning and restrictions on excessive development. Indeed, it was the concepts of stewardship and rational land planning that resulted in the founding of the U.S. Forest Service. An examination of his writings suggests that Mr. Siegan has no appreciation whatsoever of the legislative and public policy considerations that have guided the management of public resources for the last eighty years.

1400 EYE STREET, N.W. WASHINGTON, D.C. 20005
(202) 842-3400

Mr. Siegan seems to have an irrational "class-hatred" or elitist view of most of this century's public resource management issues. The framework in which he thinks about these matters is well summarized by his assertion that:

> Environmentalists want land to remain undeveloped so they can hike and camp on it . . . Many of the rich are seeking strict government controls allegedly to protect the environment . . . [but] if they are successful, these wealthy people will help bring about [government] dedicated to furthering and enhancing the life-style of those who have achieved, and are no longer seeking, material success. (Siegan, "Hope vs. Experience," Orange County Register, Sept. 22, 1974)

Mr. Siegan has also strongly criticized the long-accepted framework of zoning regulation employed by most state and local governmental units in this country since the 1920s and 1930s. Apparently, he would have us go back to a nineteenth century "private market -- no controls" era of city planning and growth management. Rejecting the landmark case Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) and all of its progeny, he would strike down any planning and zoning regulation where the locality could not prove the regulation to be "necessary to achieve a vital and pressing governmental interest." (Siegan, "Economic and Property Rights," The Supreme Court's Constitution: An Inquiry into Judicial Review and its Impact on Society 45 (Transaction Books, 1987) Whenever an ordinance failed to meet this stringent test, Mr. Siegan would require full compensation to be paid to a private landowner for any diminution in the value of his property.

Finally, it appears from his writings that Mr. Siegan vigorously opposes almost every kind of environmental protection legislated by Congress, including such fundamental statutory and regulatory initiatives as the Clean Air Act. Mr. Siegan believes that our environment would be better protected if there were no regulation and the free market were left to reign -- a position that does not augur well for an even-handed interpretation of our environmental statutes in cases that might come before him as an appellate court judge.

Indeed, Mr. Siegan says that environmentalists "border on the irresponsible" when they seek to use environmental protection laws to introduce factors relating to the quality of life into

government decision making. He rejects consideration of qualitative factors such as "waterfront and scenic terrain" in favor of a strictly quantitative cost-benefits analysis. (Siegan, "Environment and Energy," Orange County Register, June 22, 1975) Since the mid-1960s, Congress has passed numerous laws specifically requiring that factors such as those Mr. Siegan denigrates be carefully weighed in government decision making.

We believe that Mr. Siegan's views on environmental regulation, land-use planning, zoning, and public resource management place him far outside of the mainstream of American thought, and that there is a serious question whether he would abide by either Congressional intent embodied in federal environmental and land-use laws, or long-standing United State Supreme Court precedents, were he to sit on the Court of Appeals.

Therefore, we oppose his nomination to the Ninth Circuit Court of Appeals.

Sincerely,

George T. Frampton, Jr.

Pilgrim Congregational Church

UNITED CHURCH OF CHRIST

500 Broadway East • Seattle, Washington 98102 • Phone 324-3900
Mailing Address: 509 10th Avenue East

February 11, 1988

The Honorable Brock Adams
United States Senate
Washington, DC
20510

Dear Senator Adams:

I wish to register my deep appreciation for your opposition to the nomination of Robert Bork to the Supreme Court of the United States. Your courageous, committed, conscientious exercise of the constitutional mandate for Congress to advise and consent with regard to the High Court demonstrated the importance as well as the effectiveness of a system of checks and balances as it relates to the protection our judicial system from undue ideological manipulation.

It is with this same mandate in mind that I urge you to apply the utmost scrutiny to the consideration of an upcoming nomination to a position on the United States Court of Appeals for the Ninth Circuit. The Reagan Administration has nominated Bernard Siegan to fill this position.

Mr. Siegan, a law professor at the University of San Diego, has a judicial philosophy that is clearly outside the mainstream of constitutional thought. His extreme judicial views are perhaps best characterized by the word "bizarre"; they seem to lie somewhere to the extreme right of the most conservative of jurisprudential theory. These views are clearly expressed in Siegan's prolific writings and indicate that he maintains:

* That the First Amendment protects the freedom of speech only from abridgement by the Congress; the President may limit free speech at will.

* That many health and safety laws are unconstitutional, including those that pertain to minimum wage, regulation of toxic substances, and economic regulation measures.

* That the Brown v. Board of Education rulings were and are unconstitutional, hence that the courts cannot enforce desegregation rulings.

* That discrimination in jury service, voting, holding elected office, and education is not unconstitutional because the Equal Protection Clause of the Fourteenth Amendment does not prohibit such discrimination against minorities or women.

* That the Fourteenth Amendment does not incorporate the Establishment Clause of the First Amendment, thus individual states may establish an official state religion as well as requiring prayer in the schools.

Clearly, these views are far outside the mainstream of constitutional thought. Moreover, they represent a clear and present danger to the continued functioning of our judicial system in a fair and equitable way, "with justice for all." Bernard Siegan is not being considered for a position on the Supreme Court, which considers roughly 100 - 150 cases a year. Rather, he is being nominated to serve on the Court of Appeals, which reviews more than 33,000 cases per year. Obviously the Court of Appeals is the court of last resort for an overwhelming majority of court cases. To have an extreme right-wing ideologue whose views are so radically out of step with the judicial mainstream would be disastrous as well as patently unfair.

Additionally, Siegan has professional credentials that are scarcely more than minimal. By his own admission, he has not appeared in any federal court "to any . significance" and has never appeared in a federal court in the Ninth Circuit.

I am thankful that you are representing the American people in Congress, and I appeal to your sense of justice and responsibility in urging you to reject this nomination and oppose placing Bernard Siegan on the Ninth Circuit Court of Appeals. I can assure you of my complete and undivided support in your opposition to this nomination.

Thank you for taking the time to read this letter. May God continue to bless and keep you in grace, love, and peace as you seek to be about your particular ministry in your part of God's creation.

Peace!

W. Michael Litaker
Pastor

c.c.: The Honorable Joseph Biden, Judiciary Committee

COUNCIL ON RELIGIOUS FREEDOM conserving religious freedom

February 12, 1988

Senator Joseph R. Biden, Chairman
489 SROB
Washington, D.C. 20510

Dear Senator Biden:

On occasion it is possible for a presidential nomination for the federal judiciary to be sincerely presented, but ill conceived.

President Reagan's nomination of Bernard Siegan to sit on the Ninth Circuit Court of Appeals should be rejected for the same reasons that were by and large present in the nomination of Robert Bork.

In Siegan's prolific writings, speeches, and particularly in a book he authored in 1987, he makes clear that the following views would guide his constitutional opinions:

1. The Equal Protection Clause of the 14th Amendment does not prohibit states from discriminating against minorities and women in education, jury service, voting and office holding.

2. Brown v. Board of Education, the landmark case banning segregated schools, was decided for the wrong reason and the numerous decisions enforcing Brown are not justified by the Constitution. States that refuse to dismantle illegally segregated schools cannot be forced to do so by the courts.

3. States would not be prohibited from adopting an official religion or requiring school prayer because the Establishment Clause of the First Amendment was not incorporated by the Fourteenth Amendment.

4. The First Amendment prohibits only Congress from abridging freedom of speech; it does not prevent the President from limiting free speech.

5. The Supreme Court has wrongly upheld a substantial number of health and safety laws. Siegan has criticized the legal basis for numerous decisions upholding the minimum wage laws, regulation of toxics, and other forms of economic regulation.

4545 42nd Street, N.W., Suite 201 • Washington, D.C. 20016 • (202) 363-8098

[illegible] • P.O. Box 7951 • Thousand Oaks, CA 91359 • (805) 373-0310
[] Lee Boothby, J.D., Vice President • 4545 42nd Street, N.W., Suite 201 • Washington, D.C. 20016 • (202) 363-8098
[] Carl B. Watts, Secretary-Treasurer • 2075 Sleepy Hollow • Escondido, CA 92026 • (619) 747-7722

While he indicated in his earlier hearing that he would ignore his views if confirmed, it is very troubling to anticipate that a man with such strong convictions and settled philosophy could, even though sincere, avoid being influenced by such a philosophy once confirmed and on the bench. It would seem more prudent to confirm a nomination of one who has held and holds views of the constitution that are more in the mainstream of jurisprudence.

It is our hope that in this very difficult time for our nation that we will see judges confirmed that are going to be an asset to the people of the United States based on performance, rather than on promise.

Cordially,

John V. Stevens

John V. Stevens, Sr.
President

JVS/br

American Association of University Women

2401 Virginia Avenue, NW, Washington, DC 20037
(202) 785-7700

President
Sarah Harder

February 18, 1988

The Honorable Joseph R. Biden
U.S. Senate
Washington, DC 20510

Dear Senator Biden:

The Senate Judiciary Committee on which you serve will vote on the confirmation of Bernard Siegan's nomination to the Ninth Circuit Court of Appeals. On behalf of 150,000 AAUW members nationwide, I am writing today to urge you to oppose Mr. Siegan's nomination to this important federal court.

In AAUW's view, Professor Siegan does not meet the basic qualifications required of a federal appellate judge. Although he has been a professor of law since 1974 following a twenty-year career as a real estate developer and lawyer, he has never argued a case nor is even admitted to practice before a federal appellate court. His self-described ten most significant litigated cases in his career included only real estate cases which he handled before the Illinois state court between 1958 and 1966; none of these cases required a jury trial, and several involved little or no litigation. In several of these cases, he represented real estate development companies in which he had an interest. Surely there are more qualified nominees with greater breadth and depth of experience in the law than Bernard Siegan for a lifetime appointment on the nation's second highest court.

In addition to his minimal qualifications for this appointment, the radical judicial philosophy espoused by Mr. Siegan concerns AAUW greatly. His belief that property rights should be given precedence over personal rights and that minimum wage laws, child labor laws, and occupational health and safety laws intrude upon the rights of business owners is extremely troubling to AAUW. His crabbed view of the Fourteenth Amendment's equal protection clause which he maintains protects only "natural" rights such as life and liberty, but not "political" rights such as voting, jury service and education is outside the mainstream of current American judisprudence.

Siegan's statement that Title VII of the 1964 Civil Rights Act (prohibiting race- and sex-based discrimination in employment) "joins the long list of programs whose principal accomplishment is the imposition of higher prices and the acceleration of inflation"

and that the Supreme Court should not grant any cost-bearing remedies to victims of discrimination ignores and, indeed, trivializes the progress women and minorities have made in the past two decades. Should such a view prevail, enforcement of civil rights statutes would be seriously undermined. It is the statement of a provocateur, calling into question Siegan's judicial temperament and suitability for a lifetime appointment to a position of great trust.

Furthermore, Siegan's rejection of the constitutional right of privacy is unacceptable to AAUW, which since 1935 has supported the right of women to make their own reproductive choices. In 1987, AAUW convention delegates reaffirmed the individual's right to make those choices as a legislative priority for our members.

Our study of Bernard Siegan's writings and public statements has convinced us that he exhibits no commitment to the protection of liberty and individual rights. His concept of the Constitution as a document frozen in the 18th Century according to his "original intent" theory is not acceptable to women and minorities living, working, raising families and paying taxes in this century. His extremist views have been repudiated by many constitutional scholars.

I urge you to reject the nomination of Bernard Siegan to the Ninth Circuit Court of Appeals.

Sincerely,

Sarah Harder

Sarah Harder

GOLDEN GATE UNIVERSITY SCHOOL OF LAW

OFFICE OF THE DEAN

February 17, 1988

The Honorable Joseph Biden
Senate Judiciary Committee Chairman
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

I strongly urge you and the members of the Senate Judiciary Committee not to confirm the nomination of Bernard Siegan to the United States Court of Appeals for the Ninth Circuit.

Sincerely,

John P. Wilson
Dean

JPW:mg

GOLDEN GATE UNIVERSITY 536 Mission Street • San Francisco • California 94105 • Telex 6502754174 • Telephone [415] 442-7000

Alaska Center for the Environment
700 H Street, Suite 4 • Anchorage, Alaska 99501 • (907) 274-3621

February 1, 1988

Judiciary Committee
U.S.Senate
Washington, D.C. 20510

Dear Members of the Committee:

We are very disturbed by and opposed to President Reagan's nomination of Bernard Siegan to the Ninth Circuit Court of Appeals. We urge you to reject it.

Many of Mr. Siegan's extreme positions bother us greatly, but as a conservation group we are of course inclined to focus on his environmental positions. The Ninth Circuit is called upon frequently to decide a number of extremely important environmental cases, including ones originating in Alaska. Environmental laws and court decisions protect not just the rich, as Mr. Siegan apparently maintains, but all segments of society. In fact, many responsible and knowledgeable scientists are now warning us with ever-increasing urgency about the potentially catastrophic consequences that might result unless the U.S. and the rest of the world are willing to adopt strong and initially unpopular measures to combat problems like ozone depletion and the greenhouse effect.

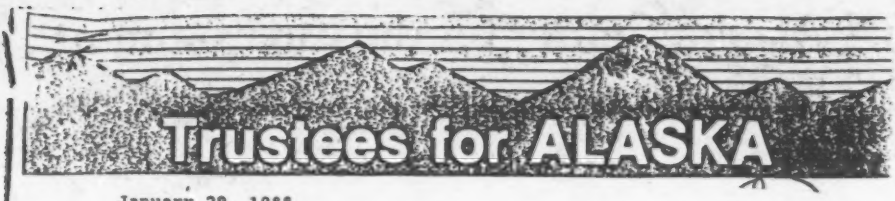
Consequently, it is imperative that judges at every level be willing and able to fairly evaluate environmental laws and problems. To appoint to such an important position as the U.S. Court of Appeals a man who opposes the ban on DDT and would repeal the National Environmental Policy Act and the Clean Air Act--and who has received the American Bar Association's lowest passing rating--would be highly irresponsible. Once again, we urge you to reject Mr. Siegan's nomination and to insist upon a nominee who will evenhandedly interpret the country's laws and constitution.

Sincerely,

Stephanie Kessler

Stephanie Kessler
Executive Director

SK:mac



January 29, 1988

Senate Judiciary Committee
U.S. Senate
Washington, DC 20510

Re: Bernard Siegan, Nominee for the Ninth Circuit

To the Committee:

Trustees for Alaska is a nonprofit, public interest environmental law firm in Anchorage, Alaska, with approximately 750 members, half of whom live in Alaska and half in the other states. We represent our members, Alaskan environmental organizations, national environmental organizations, fishermen, Native villages and groups, and anyone else who is concerned about the resources and environment of Alaska.

We have the following comments on the nomination of Bernard Siegan for the United States Court of Appeals for the Ninth Circuit:

Mr. Siegan appears to be unqualified for the Ninth Circuit bench for a number of reasons. Mr. Siegan has never before sat as a judge of any sort. Moreover, his litigation experience during his 24 years in private practice was extremely sparse; he admits that he appeared in court only "occasionally" and then mostly in state courts. He seems not to have conducted any litigation in federal courts; and there is no other evidence that he is familiar with federal court procedure. The litigation he listed in his ABA questionnaire was neither significant nor complex: it consisted of one breach of contract case and nine real estate cases -- none of which involved federal questions. Mr. Siegan's career seems mostly to have focussed on his private real estate development interests, rather than the representation of clients. While there is, of course, nothing improper about this, it hardly demonstrates the degree of experience and competence expected of a judge on one of the most prestigious courts in the country. The ABA rated him "qualified," which is the lowest possible acceptable rating.

We are also concerned about Mr. Siegan's anachronistic interpretation of the Constitution, which appears to have been influenced by his economic concerns. His view that environmental, social and civil rights laws are unconstitutional because Congress lacks the authority to enact such legislation is unique and enjoys no support among his legal colleagues.

725 Christensen Drive, Suite 4 Anchorage, Alaska 99501 (907) 276-4244

We urge the Committee not to confirm him. The Ninth Circuit and the country deserve the most qualified, experienced, intelligent, thoughtful, compassionate person available. Mr. Siegan is not that person.

Thank you for your consideration.

Very truly yours,

Patti J. Saunders

Patti J. Saunders
Acting Executive Director

Board of Directors
Robert E. Barton, Co-Chair
Neil O'Donnell, Co-Chair
Marc Weitzman, Finance Chair
Robert A. Thompson, Secretary
Bernard Zimmerman, Treasurer
William F. Alderman
William Alsup
David Andrews
Alice M. Beasley
Al Bendix
William S. Boyd
Alexander Bunzel
Richard C. Dinkelspiel
Robert L. Harris
Anne Horowitz
Terry Hudgins
Gordon J. Lau
Michael G. W. Lee
Judith McKelvey
William C. Morbeck, III
Frances Shuler Schreiber

San Francisco
Lawyers' Committee
For Urban Affairs

301 MISSION STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94105
(415) 543-9444

Staff
Mark N. Aaronson, Executive Director
Eva Jefferson Paterson, Assistant Director
Marsha Rosen, Assistant Director
Michael Harris, Staff Attorney
Bunlue P. Foster, Administrator

Immigrant and Refugee Rights Project
Robert Rubin, Managing Attorney
Ignatius Bau, Staff Attorney
Kate T. McGrath, Staff Attorney
Lesley Simon, Staff Attorney
David Rehak, Legal Assistant

February 23, 1988

Senator Patrick J. Leahy
Committee on the Judiciary
224 Senate Dirksen Office Building
Washington, D.C. 20510-6275

Dear Senator Leahy:

Enclosed you will find the resolution of the San Francisco Lawyers' Committee for Urban Affairs opposing the confirmation of Bernard Siegan as a judge of the Ninth Circuit Court of Appeals.

As you may know, the Lawyers' Committee is a unique legal services program in that our focus is on civil rights and poverty law issues while our base of support lies with the corporate bar. Indeed, the Lawyers' Committee utilizes a small legal staff to leverage substantial volunteer resources from San Francisco's large, corporate law firms to provide free legal assistance to the poor, minorities and other underrepresented interests. In addition to this pro bono attorney time, the Lawyers' Committee is supported financially by contributions from virtually all of these law firms.

The Lawyers' Committee very rarely takes a position on judicial nominations. In fact, we have done so on only one prior occasion in our twenty-year history. After careful deliberation, we have concluded that the consequences of Bernard Siegan's confirmation would be so severe as to warrant our virtually unprecedented action. The bases for our position are set forth in the enclosed resolution but can be summarized by our strongly held view that his presence on the Ninth Circuit would seriously jeopardize the fundamental rights of those individuals served by the Lawyers' Committee. We urge the Judiciary Committee to reject this nomination.

Respectfully yours,

Mark N. Aaronson

Mark N. Aaronson
Executive Director

cc: Senator Joseph R. Biden, Jr.
Senator Edward M. Kennedy
Senator Robert C. Byrd
Senator Howard M. Metzenbaum
Senator Dennis DeConcini
Senator Howell Heflin
Senator Paul Simon
Senator Strom Thurmond
Senator Orrin G. Hatch
Senator Alan K. Simpson
Senator Charles E. Grassley
Senator Arlen Specter
Senator Gordon J. Humphrey

Board of Directors
Robert E. Barton, Co-Chair
Neil O'Donnell, Co-Chair
Marc Monheimer, Finance Chair
Robert A. Thompson, Secretary
Bernard Zimmerman, Treasurer
William F. Alderman
William Alsup
David Andrews
Anita M. Beasley
Al Brunke
William E. Boyd
Alexander Bramard
Richard C. Breckenfeld
Robert L. Harris
John Hansell
Terry Hatbush
Gordon S. Lau
Michael G. W. Lee
Judith McKelvey
William C. McNeil, III
Patricia Shuler Schmidt

San Francisco
Lawyers' Committee
For Urban Affairs
301 MISSION STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94105
(415) 543-9444

Staff
Mark H. Aaronson, Executive Director
Eva Jefferson Paterson, Assistant Director
Marcia Rosen, Assistant Director
Michael Harris, Staff Attorney
Eunice P. Foster, Administrator

Immigrant and Refugee Rights Project
Robert Rubin, Managing Attorney
Ignatius Bau, Staff Attorney
Kate T. McGrath, Staff Attorney
Laura Simon, Staff Attorney
David Rorick, Legal Assistant

Resolution of the San Francisco Lawyers' Committee
In Opposition to the Nomination of Bernard Siegan to the
Ninth Circuit Court of Appeals

WHEREAS, the San Francisco Lawyers' Committee for Urban Affairs is an organization devoted to advancing civil rights, including the rights to adequate housing, employment, social services, education, health care, economic security and fair treatment within the criminal justice system;

WHEREAS, the San Francisco Lawyers' Committee is committed to ensuring due process, equal protection under the law and full and equal access to the courts for all persons;

WHEREAS, the Ninth Circuit Court of Appeals is the court of last resort in which to enforce civil rights for many people of color, low-income individuals, immigrants and refugees and other underrepresented individuals served by the San Francisco Lawyers' Committee;

WHEREAS, Bernard Siegan has written that the equal protection clause does not protect minorities and women from state discrimination in education, voting, jury service and holding office;

WHEREAS, taking issue with longstanding U.S. Supreme Court precedent, Bernard Siegan has stated that the equal protection clause does not protect black children from school segregation laws;

WHEREAS, Bernard Siegan adheres to a view that laws protecting workers against health, safety, and environmental dangers must yield to the property rights of their employers, a view rejected fifty years ago by the Supreme Court;

WHEREAS, Bernard Siegan has called upon the courts to invalidate minimum wage laws and other labor and economic regulations, a role described by Judge Robert Bork as "beyond any function that can conceivably be called judicial;"

WHEREAS, Bernard Siegan has advocated constitutional principles which would reduce access to the courts by the minorities and poor persons served by the San Francisco Lawyers' Committee thereby hampering these individuals' ability to seek redress for violations of their fundamental rights;

BE IT RESOLVED, that, because Bernard Siegan's views are so far outside the mainstream of judicial thinking, the San Francisco Lawyers' Committee for Urban Affairs opposes the confirmation of Bernard Siegan as a judge of the Ninth Circuit Court of Appeals and urges the United States Senate to reject his nomination.

1000 FRIENDS OF OREGON

February 23, 1988

The Honorable Joseph R. Biden, Jr.
United States Senate
Washington, D.C. 20510

Re: Nomination of Bernard H. Siegan to the United States Court of Appeals for the Ninth Circuit

Dear Senator Biden:

I am writing you to express 1000 Friends of Oregon's strong opposition to the appointment of Bernard H. Siegan to the United Sates Court of Appeals for the Ninth Circuit.

1000 Friends of Oregon is a non-profit public interest group founded in 1974 to monitor and enforce Oregon's land use planning program. In 197 Oregon created the nation's first comprehensive land use planning program. In 1986 the Florida and New Jersey legislatures adopted similar legislation. The Maine and Vermont legislatures are now considering doing so.

Oregon's program requires local governments to develop land use plans which meet planning goals established by a state agency, the Land Conservation and Development Commission. These goals protect Oregon's farm and forest lands, and preserve Oregon's coastal resources. They also support and channel residential, commercial, and industrial development to appropriate sites within urban areas.

1000 Friends of Oregon endorses the Center for Law in the Public Interest's December 27, 1987 analysis of Mr. Siegan's judicial philosophy on land use regulation. As the analysis makes clear, Mr. Siegan "advocates a far-rightist judicial activism that would strike down a myriad of local planning and zoning ordinances--including most local growth control and environmental protection measures--as unconstitutional 'takings' of private property." An attorney in our office shared the 1984 program platform with Mr. Siegan at Northwestern College of Law, Portland, when Mr. Siegan made the remarks cited in CLIPI's analysis. I spoke later in the day and heard his speech.

300 WILLAMETTE BUILDING 534 SW. THIRD AVENUE PORTLAND, OREGON 97204
(503) 223-4396

Were Mr. Siegan's extraordinary views on the constitution to prevail, the careful effort of the Oregon legislature over the past 15 years to protect Oregon's resource lands and encourage economic development would be for naught. These laws have been supported by statewide votes of the people in 1976, 1978 and 1982. These laws have also been upheld by the Oregon Supreme Court.

Mr. Siegan's views are not simply out of the "mainstream". The extremist constitutional theories he espouses are at fundamental variance with the positions which judicial appointees of President Reagan have formally adopted on the taking issue.

On August 9, 1987 I spoke at the annual meeting of the American Bar Association in San Francisco. One point I made was that three Reagan appointees to the U.S. Supreme Court--Justice O'Connor, Chief Justice Rehnquist, and Justice Scalia--have each authored either unanimous or majority opinions on the court on takings related issues. In two of these cases the court established (correctly in my view) new policy in certain minor respects. However, the Lutherglen and Nollen opinions also went out of their way to reaffirm prior U.S. Supreme Court interpretations of the U.S. Constitution dating back to the 1920's with respect to the authority of local governments to regulate the use of land.

These interpretations implicitly reject Mr. Siegan's theories of the constitution which are driven by extreme economic ideologies which have no basis in judicial precedent or traditional legal analysis.

I am aware of no opinion of a state appellate court or federal trial or appellate court which has held in accordance with Mr. Siegan's basic views in a land use regulation case.

In a 1985 address at Mr. Siegan's law school Judge Robert Bork rejected Siegan's theories of the constitutionality of government regulation; saying they were "revolutionary" and would bring about "a massive shift away from democracy and towards judicial rule."

If Judge Bork's views of the constitution were regarded as out of the mainstream by members of the Senate Judiciary Committee, it would be hard to understand how a nominee whose views were more extreme than Judge Bork's could be found acceptable.

Very truly yours,

Henry R. Richmond
Executive Director

hrr/nsk/ah

cc: Members of the Senate Judiciary Committee
The Honorable Mark Hatfield
The Honorable Bob Packwood

Attach.

Natural Resources
Defense Council

90 New Montgomery
San Francisco, CA 94105
415 777-0220

February 22, 1988

VIA FEDERAL EXPRESS

Senator Joseph R. Biden, Jr.
Chairman Senate Judicary Committee
224 Dirksen Office Building
Washington, DC 20510

RE: Judicial Nomination of Bernard Siegan

Dear Senator Biden:

I am writing to express the opposition of the Natural Resources Defense Council and its members to the nomination of Bernard Seigan to the United States Court of Appeals for the Ninth Circuit. As you know, Senate Judiciary Committee hearings on the nomination are now scheduled for this Thursday, February 26, 1988. The NRDC Board of Directors recently voted to oppose this nomination, only the second time the Board has authorized such action (the other was to Judge Robert Bork).

Mr. Siegan is now a law professor at the University of San Diego. For many years he has written extensively attacking both environmentalists in general and a host of environmental laws in particular. Yet, the United States Court of Appeals for the Ninth Circuit, to which he would be appointed, has become increasingly important in the area of environmental protection (especially in the areas of offshore drilling, public lands, forestry and toxic chemicals) and is most often the court of last resort.

As an academic and formerly as a real estate developer and lawyer, Mr. Siegan has written frequently about the need to roll back or repeal most of the nation's principal environmental laws. He has written, for example, that Congress and the executive branch should foster "the law of supply and demand" by "remov[ing] obstacles to its operation such as the many laws and regulations adopted in the name of environmentalism," contending further "this country has been on an environmental binge in recent years that is raising havoc...." Included in his writings are statements highly critical of (1) the ban of DDT; (2) strip mining controls; (3) the National Environmental Policy Act;

100% Recycled Paper

New York Office:
122 East 42nd Street
New York, New York 10168
212 949-0049

Washington Office:
1350 New York Ave., N.W.
Washington, DC 20005
202 783-7800

New England Office:
850 Boston Post Road
Sudbury, MA 01776
617 443-6300

Toxic Substances
Information Line:
USA: 1-800 648-NRDC
NYS: 212 687-6862

(4) and such other environmental statutes as the Clean Air Act which he referred to as "probably the grossest example of a law passed on the basis of half truths." What makes Mr. Siegan's anti-environmental policy views even more troubling are his bizarre views of the Constitution and frequently expressed contempt for the legislative process. Together, these provide a dangerous formula for judicial adventurism.

Thus, in his recent book, entitled The Supreme Court's Constitution, and in an earlier work, entitled Economic Liberties and the Constitution, Mr. Siegan has seriously questioned whether the framers of the Constitution intended Congress to have the power to enact broad-based remedial legislation such as the major environmental statutes. And he argues in his writings for a return to the pre-1930 "substantive due process" right to contract test announced in Lochner v. New York (1905) and used to invalidate a host of social legislation. His writings also challenge the 168-year-old principal established in the landmark case of McCulloch v. Maryland (17 U.S. 316) that the "necessary and proper" clause allows Congress broad authority to implement its specifically enumerated powers.

Mr. Siegan's specialty has been real property, both as a real estate lawyer/developer and an academic. He has been highly critical of the exercise of zoning authority by local municipalities to regulate real estate development or growth. Among other things, he believes that Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926), which established the principal that municipalities exercise of zoning ordinance authority can be set aside only if shown to be arbitrary and capricious with no link to public health and safety, was wrongly decided. In recent writings he has also urged the courts to exercise expanded use of the Taking's Clause to hold that, where government regulations diminish property values, this results in unconstitutional taking absent proof by the locality that such regulation is vital to health and safety. These views, separately and taken together, would put most environmental legislation in serious jeopardy in Mr. Siegan's courtroom.

Mr. Siegan has also been openly critical of the environmental movement, and those in the American population who support environmental safeguards. He

repeats the stereotype that environmentalist groups are elitist and dominated by the wealthy who are only interested in protecting and preserving what is theirs. In one article, he characterizes environmentalists as "super libs who are the toughest backers of tough state and federal land use controls whose biggest beneficiaries are the well to do and the rich."

After examining Mr. Siegan's career as a real estate lawyer and professor, the ABA standing committee on the judiciary gave him a "qualified" rating, the lowest passing grade. Out of his 24 years in private practice ending in 1971, he spent 21 in the dual capacity of both real estate developer and attorney. It is unclear how much time he devoted to practicing law as opposed to developing real estate. His legal work appears primarily to involve representing his personal real estate development interests. In the ABA questionnaire, Mr. Siegan admitted that he appeared in court only "occasionally," "almost all experience in state courts" with no appearance in federal courts or other evidence that he is familiar with federal procedure. When asked to describe "the ten most significant litigative matters which he personally handled," in 24 years of practice, Mr. Siegan listed one breach of contract case and nine real estate cases, none of which seemed to be major or complex.

The vast majority of the American public fully supports the landmark environmental laws that have served our nation so well. And virtually all constitutional scholars acknowledge the power of Congress to enact such laws within the framework of the Constitution. Mr. Seigen's apparent views to the contrary are outside the mainstream and do not justify his appointment to the United States Court of Appeals for the Ninth Circuit.

Very truly yours,

Albert H. Meyerhoff
Senior Staff Attorney

Response! Mail to. -D

LAW OFFICES OF
ALSCHULER, GROSSMAN & PINES
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
TWELFTH FLOOR, 1880 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067-1594
TELEPHONE (213) 277-1226

LEON B. ALSCHULER
1910-1987
OF COUNSEL
MAURICE MAC GOODSTEIN
IRVING KELLOGG*

CABLE: SAGELAW
TELEX: 183950
TELECOPIER:
(213) 552-9077

February 4, 1988

OUR FILE NO.

WRITER'S DIRECT DIAL NUMBER
(213) 551-

The Honorable Joseph Biden
224 Senate Dirksen Office Building
Washington, D.C. 20510

Attn: Diana Huffman

Re: Nomination of Bernard Siegan

Dear Senator Biden:

We are writing to express our opposition to the proposed confirmation of Bernard Siegan as a justice on the United States Court of Appeals for the Ninth Circuit. Mr. Siegan is not qualified to hold a position of such responsibility. Mr. Siegan lacks the necessary practical legal experience to qualify him as a viable nominee, having spent the vast majority of his years in private law practice as a real estate attorney with minimal courtroom experience. More importantly, Mr. Siegan's legal philosophies and theories reveal a disturbing contempt on his part for long-standing constitutional principles and lines of precedent essential to the protection of the rights of minorities, women and the disadvantaged.

Mr. Siegan purports to be a "strict constructionist" when it comes to interpreting the Constitution, and has harshly criticized what he has perceived as past instances of "judicial activism." However, Mr. Siegan's personal brand of strict constructionism smacks of extremism and runs counter to established legal precedent. Moreover, Mr. Siegan is highly inconsistent in his stance against judicial activism. For example, Mr. Siegan consistently advocates judicial restraint in cases involving the protection or expansion of civil rights and individual liberties, but argues for a greater judicial role with little deference to Congressional intent in cases involving the protection and expansion of property rights. In short, Mr. Siegan only applies

his strict constructionist philosophies when they will best serve his own unspoken but unmistakable agenda.

On the basis of his self-constructed philosophies and theories, Mr. Siegan has propounded a number of truly frightening views on matters of fundamental importance, including the following:

1. Discrimination - It is constitutional for states to discriminate against minorities and women with respect to the right to education, the right to vote and the right to hold public office.

2. School Segregation - Brown v. Board of Education, 347 U.S. 483 (1954), the landmark case which banned segregated schools was decided for the wrong reason, and subsequent Supreme Court decisions enforcing Brown over the last 30 years are wrong because courts have no authority to remedy unlawful segregation.

3. Establishment of Religion - The Establishment Clause of the First Amendment does not apply to the states. Under this view, states may adopt an official religion and require school prayer.

4. Free Speech - The First Amendment free speech guarantee only applies to Congress and not to the Executive Branch, the states or any other branch or institution. Thus, for example, the President may constitutionally limit free speech. Siegan has even argued that the Supreme Court was wrong when it rejected the Nixon Administration's efforts to stop the New York Times from publishing the Pentagon Papers.

5. Regulation of the Economy - Economic and property rights are "natural rights" and Congress is not competent to regulate business and the economy. Accordingly, the Supreme Court should apply a more rigorous constitutional standard in reviewing legislation affecting the economy and should be more willing to strike down economic laws. Siegan endorses early Supreme Court decisions (long since rejected) which invalidated legislation that sought to establish minimum wage levels (Adkins v. Children's Hospital, 261 U.S. 525 (1923)), standards for reasonable working hours (Lochner v. New York, 198 U.S. 45 (1905)), and the prevention of anti-union practices (Adair v. U.S. 298 U.S. 161 (1908)).

These and other bizarre positions taken by Mr. Siegan on key constitutional law issues would be almost laughable were they not held in earnest by a potential Ninth Circuit appellate court justice. Mr. Siegan contends that the significance of his philosophies and written criticism of settled legal doctrines should be minimized in evaluating his fitness as an appellate court nominee because his views would not influence him as an appellate

judge. However, as the eminent constitutional law scholar Professor Charles Black aptly observed, "In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness." (Charles Black, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 Yale Law Journal 657, 663 (1970)).

We of the Asian Pacific community are particularly concerned about Mr. Siegan's possible confirmation because Mr. Siegan's thinking harbors a decided antagonism toward the needs of minorities, women, and the other less powerful segments of our society. Indeed, Mr. Siegan's presence on the Ninth Circuit Court of Appeals would represent a real threat to the major gains made in the areas of civil rights and individual liberties over the last three decades.

For all the foregoing reasons, we oppose Mr. Siegan's nomination to the Ninth Circuit Court of Appeals and strenuously urge you to vote against his confirmation.

Sincerely,

Stewart C. Kwoh
Executive Director
Asian Pacific American
Legal Center

Curtis R. Namba, President
Asian Bar Association of
Sacramento

Hoyt H. Zia, President
Asian Pacific Bar of
California

Arthur P. Song, President
Korean-American Bar Association
of the Greater Los Angeles
Area

Robert M. Kawahara, President
Japanese-American Association
of the Greater Los Angeles
Area

Sandra J. Chan, President
Southern California Chinese
Lawyers' Association

WASHINGTON LEGAL WORKERS
Affiliated with the National Organization of Legal Service Workers, District 65, UAW
P.O. BOX 3719 KENT, WA 98032 (206) 948-0343

February 10, 1988

Senate Judiciary Committee
224 Senate Dirksen Office Bldg.
Constitution Ave. NE
Washington D.C. 20510

RE: NOMINATION OF BERNARD H. SIEGAN TO THE NINTH CIRCUIT COURT OF APPEALS

Dear Committee Members,

As officers of a legal workers union whose members represent low-income clients of diverse racial, spiritual and cultural backgrounds, we followed and applauded the courage which the majority of you demonstrated in rejecting the Supreme Court nomination of Robert Bork whose views were clearly inimical to the interests of our clients and Americans generally. We now ask that you demonstrate similar courage in rejecting the nomination of Bernard Siegan to our Circuit Court of Appeals, which effectively is the court of last resort for almost all of our clients.

The people and judiciary of this country have labored long and hard over the last two centuries to move our society towards fairness, equality and diversity of belief. A cornerstone of that evolution has been our Constitution whose Framers intentionally made flexible so that it could accomodate the gradual, inevitable changes in values that a healthy, maturing society must undergo to survive and prosper.

Now comes Mr. Siegan, who not only has never sat as a judge at any level, but has had a career as an attorney which is noteworthy only for its lack of distinction, proclaiming far-out views as the following:

1) Brown v. Board of Education was decided for the wrong reason and therefore decisions enforcing it are constitutionally unjustifiable.
2) The Supreme Court for a great number of years has been wrong in not striking down a substantial number of health, safety and labor laws, including minimum wage laws, toxic-related legislation and other forms of economic regulation (Even Judge Bork is not willing to revive such Lochner era judicial activism).
3) The Equal Protection Clause does not prohibit states from discriminating against minorities and women in education, jury service, voting and office holding.

4) States are not prohibited from adopting an official religion or requiring school prayer because the First Amendment's Establishment Clause was not incorporated by the First Amendment and therefore does not apply to the states.
5) The President has the right to limit free speech because the First Amendment only prohibits Congress from doing so.

We have no quarrel with Mr. Siegan's right to hold his "libertarian" views of the doctrine of "original intent" since that is his constitutional right. However, we are persuaded that the exercise of his atavistic constitutional interpretations, which have long ago been left behind by the vast majority of people and jurists in this country should be relegated to the classroom where, hopefully, they will do the least amount of harm.

We need justices who are flexible in their thinking in order to apply a uniquely flexible document. Mr. Siegan's narrow, ideological views just do not measure up to this standard and therefore disqualify him from holding a seat on a very important and powerful court.

Thank you for your consideration of our opinion in this vital matter.

Sincerely,

Robin Zukoski, President

Sara Campos, Vice-President

Estella Del Villar, Secretary

John Hughes, Treasurer

Washington Legal Workers Union

La Raza Lawyers Association

P.O. Box 948 • Fresno, California 93714

January 9, 1988

Sen. Joseph Biden
224 Dirksen Office Building
Washington D.C. 20510

Attn: Diana Huffman

Dear Senator:

I am writing on behalf of the La Raza Lawyers Association, located in Fresno, California, regarding Bernard Siegan, President Reagan's nominee to the Ninth Circuit Court of Appeals. The La Raza Lawyers Association is in receipt of, and has reviewed, the People For the American Way's report on Bernard Siegan. Our Association agrees with the People For the American Way that Siegan's views are completely unacceptable and that he should be rejected by the Senate Judiciary Committee.

Some of Siegan's more disturbing views include the beliefs that: states have the right to discriminate against women and minorities in education, jury service, voting and office holding; the President and the judiciary are entitled to infringe upon our First Amendment protection of free speech; states are free to establish their own religions and to require school prayer; zoning and minimum wage legislation are both unconstitutional. These views are certainly out of the mainstream of accepted American belief on the role of the government and the rights of the people.

Our association opposes Siegan's confirmation and we urge you to vote against his confirmation.

Thank you for your time and consideration.

Sincerely,

Rosendo Peña, Jr.
President, La Raza Lawyers Association

LAW OFFICES
BLECHER & COLLINS
A PROFESSIONAL CORPORATION
TWENTY-EIGHTH FLOOR
611 WEST SIXTH STREET
LOS ANGELES, CALIFORNIA 90017

(213) 622-4222
TELECOPIER (213) 622-1656

January 8, 1988

Senator Joseph Biden
224 Senate Dirksen Office Building
Washington, D.C. 20510

ATTENTION: Steven Metalitz

Dear Senator Biden:

As a lawyer specializing in the representation of antitrust plantiff in the Ninth Circuit, I am deeply troubled by the nomination of Bernard Siegan to be a judge of the Ninth Circuit Court of Appeals.

It is Professor Siegan's radical views on economics and antitrust that cause me the same concern as I expressed to your Committee during the hearings with respect to Judge Bork. I know that there has been opposition to Professor Siegan in respect to his views on constitutional, discrimination, civil rights and First Amendment issues. I do not regard myself as competent to express a view on those subjects and my opposition is based on the limited ground that Professor Siegan's economic views are out of touch with the mainstream of American jurisprudence at this point in our history.

Professor Siegan has expressed the view that business and economic lawas interfere with one's right to use property as one wishes and that federal economic regulation should be subject to federal constitutional restriction. This view is not that of a traditional conservative who normally defers to the legislative process and argues for less judicial activism. Rather, Professor Siegan's views reflect a distrust of the legislative process and an expansion of the judicial role in restricting the ability of the legislature to address

LAW OFFICES
BLECHER & COLLINS
A PROFESSIONAL CORPORATION

business and economic issues. Professor Siegan had stated his view "because of its limitations and infirmities, the legislature should note the final authority in socioo-economic matters." Professor Siegan concludes that there is a "need for the judiciary to safeguard [economic] liberties of those affected by legislation ..." Bernard H. Siegan, Economic Liberties and the Constitution, 321.

The views expressed here would not portend well for persons seeking redress for economic wrongs under the antitrust laws or the securities laws or laws designed to protect the environment. Professor Siegan's notion of economic legislation rejects at least 50 and maybe 100 years of Supreme Court precedents.

The Ninth Circuit has now become the central federal circuit in terms of antitrust litigation in the United States. Professor Siegen would likely be involved in many cases where he could attempt to fashion new legal principles to conform with his peculiar views of what the law should be, rather than what it is.

I urge that you reject the nomination of Professor Siegan as a judge for the Ninth Circuit Court of Appeals.

If I may be of any further assistance, please do not hesitate to call.

Very truly yours,

MAXWELL M. BLECHER

MMB:ra

ADA

Americans for Democratic Action, Inc.

815 15TH STREET, N.W., SUITE 711 • WASHINGTON, D.C. 20005 • (202) 638-6447

Congressman Ted Weiss
President

James J. Bishop
Chairperson, National
Executive Committee

Marvin Rich
Treasurer

Mildred Jeffrey
Secretary

Wm. Nemmers
Counsel

Marc A. Pearl
National Director

Vice Presidents
Bella Abzug • Polly Baca
Herman Badillo • J. Bill Becker
Myron Berger • Owen Brewer
Dorothy Cameron • Candess Collins
John Conyers Jr. • Cushing N.
Dolbeare • Edward Donahue
Robert F. Drinan S.J. • Marian
Wright Edelman • Don Edwards
Murray Finley • Barney Frank
Arvonne Fraser • Donald M.
Fraser • Mary Hatwood Futrell
Jon Kenneth Galbraith • Robert
Garcia • William Gray • Michael
Harrington • Charles Hayes
Maynard Jackson • Kent Johnson
Irene Kostmayer • William Lucy
Leon Lynch • Hilda Mason
Gerald McEntee • George
McGovern • Joyce Miller
Patsy T. Mink • Dolores Mitchell
Pauli Murray • Bruce Morrison
Stewart Mott • Eleanor Holmes
Norton • Major Owens • Charles
Perlgut • Joseph L. Rauh Jr.
Edward Roybal • Alice Sachs
Howard Samuel • Arthur
Schlesinger Jr. • Pat Schroeder
Jacob Stein • Leon Shull
Rabbi M. Stern Jr. • Louis
Stokes • John Sweeney
William Taylor • Lester
Thurow • Robert Torricelli
Harold Washington • Jean
Westwood • Lynn Williams
William Winpisinger • Addie
Wyatt • William Wynn
Molly Yard • Andrew Young

December 9, 1987

Honorable Joseph Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Biden:

By this letter Americans for Democratic Action, Inc. formally requests an opportunity to testify regarding the nomination of Bernard Siegan to the Ninth Circuit Court of Appeals.

Bernard Siegan's views are clearly out of the mainstream. Recent statements by Senators that lower court nominees' views are less important for consideration than those of a higher court nominee is a misconception that clearly needs to be corrected. The appellate process is this nation's path to justice, and for that route to be potentially obstructed by a jurist of extreme views is simply not the intent of our Constitutional framework.

We would appreciate the opportunity to testify on these and other concerns before the Judiciary Committee. Thank you very much for considering this request.

Sincerely,

Marc A. Pearl
National Director

MAP/pk

National Lawyers Guild
San Francisco Bay Area Chapter

January 21, 1988

The Honorable Joseph R. Biden
Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Senator Biden,

On behalf of the thousand members of the San Francisco Bay Area Chapter of the National Lawyers Guild, I am writing to express our vehement opposition to the appointment of Bernard Siegan to the Ninth Circuit Court of Appeals. Our members appear regularly before the Ninth Circuit and we believe it would represent a travesty of justice for Mr. Siegan to be confirmed.

Even a cursory look at Mr. Siegan's writings reveals that his positions on matters of major constitutional significance fall far outside the mainstream of even conservative constitutional thought and debate. His belief that the Equal Protection Clause of the Fourteenth Amendment does not prevent discrimination in jury service, education and voting presents a frightening specter for minority litigants in the Ninth Circuit. Moreover, his clearly articulated view that the Supreme Court has been wrong in upholding much economic and social welfare legislation over the past 50 years posits a return to the days when unsafe working conditions, unregulated working hours and anti-union practices were provided judicial protection.

There is a major contradiction in Mr. Siegan's position that judges in reviewing economic legislation should be "activist" in considering legislative decision-making "because of its limitations and infirmities, the legislature should not be the final authority in socio-economic matters," and his view that the court's power should be limited when reviewing cases involving individual rights and liberties. These positions both represent a radical departure from established principles of judicial review and substantive constitutional law. Mr. Siegan's appointment threatens to turn the clock back on the slow progress that has been made over the last 50 years to assure that the courts play a role in helping to eliminate insidious forms of discrimination at work, at school or at the polling place.

Mr. Siegan's commitment to property rights and concern for economic considerations has led him to the conclusion that the role of the courts is to protect the interests of businessmen and property holders from legislative encroachments. Based on this analysis, Mr. Siegan has attacked much environmental and worker safety legislation on the grounds that it is too costly and

558 Capp St. San Francisco 94110 (415) 285-5066

unreasonably intrudes on business. According to Mr. Siegan, "the problem is that the cost and consequence of regulatory programs most of the time negates, overcomes or overwhelms any derived benefits. Society will not therefore be any worse off in their absence." ("Occupational Licensing," Orange County Register, Oct. 23, 1977.) Furthermore, Mr. Siegan believes that Title V II which prohibits sex and race discrimination in employment is of questionable constitutional validity since it imposes costs on business. In fact, says Mr. Siegan all government regulations "should be removed which interfere with the incentive to profit, including getting rid of bars to entry into business and restraints on production and hiring." ("Helping Marginal Workers," Orange County Register, Sept. 18, 1977.)

Many close questions involving statutory construction of employment and worker safety laws are repeatedly before the Ninth Circuit. It is clear from Mr. Siegan's extensive writings in both legal publications and the press that he holds extremely strong views on these matters, which would undoubtedly prevent a fair and open-minded consideration of these issues.

As practitioners before the Ninth Circuit, we are also concerned with his obvious lack of qualifications for the bench. Besides having received the lowest passing grade from the ABA, a "qualified" rating, he has no judicial and barely any advocacy experience. Given the number of extremely qualified lawyers throughout the state of California, it is an affront that a lawyer who has never argued before the Ninth Circuit or presented a case in any District Court within the Circuit should be appointed.

In attacking the Carter Administration's consideration of affirmative action criteria in the selection of federal judges, Mr. Siegan said "Justice, efficiency and productivity suffer when people are given responsibility for which they are unqualified." ("Is Affirmative Action in Judgeships Unjust?" Orange County Register.) We agree. We would therefore urge you and the Senate Judiciary Committee to resoundingly reject Mr. Siegan's nomination on the grounds that he is an extremist who falls outside the constitutional mainstream, he presents a serious threat to the interests of litigants before the Ninth Circuit and that he is unqualified for the job.

We believe that new standards were set during the Bork nomination hearings and we appreciate the role that you played in helping to establish a floor below which a judicial nominee could not fall. It seems clear that Mr. Siegan's views place him in the basement and that his nomination should be rejected.

We are counting on you and the Senate Judiciary Committee to send a message to the White House that ideologues such as Mr. Siegan are unacceptable judicial nominees.

We would appreciate hearing from you when the Siegan hearing will resume and at this time would request an opportunity to testify if you think it is appropriate.

Sincerely yours,

Abby Ginzberg
President, San Francisco
Bay Area Chapter
National Lawyers Guild

cc: Senate Judiciary Committee
Senator Alan Cranston
Senator Pete Wilson

NARAL

November 25, 1987

Senator Joseph Biden
Senate Judiciary Committee, Chair
224 Dirksen Senate Office Building
Washington, DC 20510

ATTN: Steve Metalitz

Dear Senator Biden:

On behalf of the National Abortion Rights Action League (NARAL), I am writing to request an opportunity to testify at the hearings regarding the nomination of Bernard Siegan to serve as a federal judge on the Ninth Circuit Court of Appeals.

NARAL opposes the confirmation of Bernard Siegan. His writings clearly indicate hostility towards constitutional protections for individual rights. For example, Professor Siegan has questioned whether women should have protection under the equal protection clause of the 14th Amendment and whether the Constitution protects a right to privacy.

I understand that the Committee has not yet scheduled hearing dates. I would very much appreciate it if I would be notified when the Siegan hearings are scheduled.

Thank you for your consideration in this matter.

Sincerely yours,

Kate Michelman

Kate Michelman
Executive Director

National Abortion Rights Action League
1101 14th Street, N.W., 5th Floor
Washington, D.C. 20005
202-371-0779

University of San Diego

School of Law — Office of the Dean

June 19, 1987

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Biden:

I am writing in support of the nomination of Professor Bernard Siegan for appointment to the Ninth Circuit Court of Appeals. I support his appointment with great enthusiasm.

Professor Siegan is currently a Distinguished Professor of Law at the University of San Diego. He is an excellent teacher, one who is extremely popular and highly respected by both students and fellow colleagues.

As Professor Siegan's Resume indicates, he is a very highly regarded constitutional law scholar. His list of publications is impressive and includes the highly acclaimed book on Economic Liberties and the Constitution. Professor Siegan is understandably in demand as a speaker on constitutional law issues throughout the country. He has a perspective on constitutional interpretation that is deserving of national attention. Despite his extremely busy schedule, Professor Siegan finds time for a great deal of public service. He has, for example, in recent years served on the President's Commission on Housing and is currently a member of the President's Commission on the Bicentennial of the United States Constitution.

Professor Siegan's professional achievements only reflect one of the reasons why he is an outstanding candidate for appointment to the Ninth Circuit Court of Appeals. Along with being a true scholar of the law, he is a warm, easily accessible person who is liked and respected by everyone. He is extremely hardworking and highly principled and would be a superb colleague for the other members of the bench.

Although I would feel a great sense of loss in having Professor Siegan leave our faculty and his departure would certainly create a void, I would rejoice in his appointment. I have the greatest admiration and respect for Bernard Siegan.

Sincerely,

Sheldon Krantz, Dean

SK:sc

Alcalá Park, San Diego, California 92110. 619/260-4600

University of San Diego

School of Law

June 25, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Senator Biden:

I write to you to urge the confirmation of Bernard Siegan as a judge of the Ninth Circuit Court of Appeals.

I have known Professor Siegan both professionally and personally since 1980 when I joined the faculty of the University of San Diego School of Law as Director of the Environmental Law Clinic and as a Clinical Professor of Law.

My particular legal specialization is in the field of Environmental Law and I have recently been awarded a major environmental organization's public award for outstanding achievement in environmental protection. I mention this only to demonstrate my own personal commitment to and reputation in this area.

Professor Siegan's views are different from my own both in politics, generally, and in environmental protection, particularly. Nevertheless, I endorse his nomination and recommend him to you without reservation.

He is a man of great intellectual capacity, unquestioned integrity and a kind and thoughtful person. I can think of no better qualification for this position than these.

He will be a fine addition to the federal bench and I am confident he will produce thoughtful, and fair appellate opinions following the law in each case in an impartial manner.

Very truly yours,

Richard J. Wharton

Richard J. Wharton
Director
Environmental Law Clinic

RJW/rg

Alcalá Park, San Diego, California 92110 619/260-4600

University of San Diego

School of Law

May 28, 1987

Senator Joseph R. Biden
Russell Senate Office Bldg.
Washington DC 20510

Dear Senator Biden:

The purpose of this letter is to express my support for the appointment of Professor Bernard Siegan to the Federal Court of Appeals for the Ninth Circuit.

Professor Siegan and I have been colleagues at the University of San Diego School of Law for approximately ten years. During a portion of that time, while I served as Associate Dean for Academic and Student Affairs, I would hear student, faculty and other persons' comments, opinions, and complaints. While I was Associate Dean and now as a member of the tenured faculty, I am pleased to report that I have heard only positive and laudatory comments about Professor Siegan's character and ability. He is regarded as an excellent teacher, a talented scholar, and a genuinely nice person who is open-minded and fair.

Although Professor Siegan and I do not always share similar legal or political views, I would never hesitate having him decide a case in which I was involved for I know he would be eminently fair and reasonable. His experience and temperament makes him a superb choice for the position.

Sincerely,

Virginia V. Shue
Professor of Law

VVS:ej

Alcalá Park, San Diego, California 92110 619/260-4600

RECEIVED JUL 0 9 1987

University of San Diego

School of Law

July 6, 1987

Senator Joseph R. Biden, Jr.
Chair, Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Professor Bernard H. Siegan

Dear Senator Biden:

I write you to support Professor Siegan's nomination to the Ninth Circuit Court of Appeals. His confirmation is now before your Committee and I urge its passage.

I have known and worked with Bernie Siegan for the past ten years. I like him personally very much and highly respect his legal knowledge, intelligence and integrity. I am probably as much a "liberal" as he is a "conservative" (as those terms have come to be defined) but his traits of honesty, compassion and fairness weigh more heavily with me and prompt this letter of support.

Sincerely,

Robert L. Simmons
Professor of Law

RLS/rg

Alcalá Park, San Diego, California 92110 619/260-4600

University of San Diego

School of Law

April 6, 1987

Senator Joseph R. Biden
Russell Senate Office Bldg.
Washington, DC 20510

Dear Senator Biden:

I write in support of the nomination of Professor Bernard Siegan to the Court of Appeals for the Ninth Circuit and I urge his confirmation to this post.

Professor Siegan has been a colleague and friend ever since I came to San Diego in 1973. During the time we have worked together I have been able to observe him carefully as a lawyer, as a teacher, as a scholar and most importantly, as a human being. Through all these observations I have come to think I know him well and can therefore recommend his confirmation without qualification or hestitation.

As a lawyer Bernie is first rate. He is able to grasp legal concepts readily and knows how to turn them to effective use in advocacy. I find his approach to legal problems to be practical and thoughtful and not surprisingly, I understand he was most successful when he practiced law in Chicago.

As a teacher of Constitutional Law I know him to be adept at conveying complex ideas to students and he is also considered a fine teacher by those students privileged to have been in his class. It is noteworthy that while many people consider him to have strong ideologically based beliefs, which I think he does, as a teacher his presentation is free of any overtones that he is preaching some personal view rather than providing a balanced introduction to Constitutional Law.

As a scholar I believe his work a worthwhile contribution to the literature surrounding contemporary Constitutional analysis. I must confess to remaining unconvinced by some of his arguments concerning "original intention" but I have no doubts either about his sincerity or his basic view that an important, indeed the important, function of a court is to stand between a beleagured individual and the amassed power of the state. In all my discussions with him I have found him to be a stubborn advocate of his beliefs but always receptive to arguments in opposition to his positions.

It is as a human being that I find Bernie most attractive. I know him to care for others, especially those experiencing misfortune. He is kind and compassionate and acts accordingly. Many years ago when a now deceased colleague began his long battle with a brain tumor, it was Bernie who unselfishly gave of his time and energy to be of help. When Bernie's beloved wife, Sharon, died of cancer I know how he suffered and how much he devoted himself to her care and comfort. I can honestly say that he is a wonderful person.

By way of autobiographical disclosure I am a member of the Faculty of University of San Diego School of Law and have been so for 14 years. I have served as Assoc. Dean. I am also a forty-four-year-old life long registered Democrat. I believe in the classical liberal view of our obligations to others and have tried to live my life accordingly. Quite honestly, I find nothing in my outlook that prevents me from giving my wholehearted support to Professor Siegan. I know he will be a fine judge of the Ninth Circuit.

On July 1, 1987, I will begin my appointment as Dean of the Dickinson School of Law in Carlisle, PA. Either before then, or later if you think useful, I would be pleased to provide further information, including testimony, in support of Bernie.

Thank you for considering my comments.

Sincerely,

Michael J. Navin
Professor of Law

MJN/rg

cc: Senator Strom Thurmond

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

WILLIAM K.S. WANG
Professor of Law

July 10, 1987

The Honorable Joseph R. Biden, Jr.
Chairman,
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

I am delighted to support Professor Bernard Siegan's confirmation as a judge of the Ninth Circuit. He is eminently qualified for the position.

I first met Professor Siegan in 1974, when he joined the faculty of the University of San Diego Law School. I was a law professor there from 1972 to 1981. During that period, I developed a great affection and respect for Professor Siegan. He became one of my closest friends on the faculty. In fact, he so impressed me that I audited one of his classes for most of one semester. I found him to be an insightful and scintillating teacher, who was justifiably popular with the students.

Indeed, Professor Siegan is liked and admired by virtually everyone he meets. He is both brilliant and self-deprecating, a rare combination. He is also blessed with a wry, soft-spoken, but appealing sense of humor.

His good nature, kindness, and generosity are especially endearing. I have never seen him lose his temper. He is always courteous and considerate. From my perspective as a Chinese-American, Professor Siegan has always seemed sensitive to the feelings of minority groups.

You have undoubtedly received many letters about Professor Siegan's truly outstanding intellect and scholarship. I can only echo this praise. Professor Siegan and I have had countless debates and discussions on all sorts of issues, and I have always found him brilliant and delightfully thought-provoking.

The Honorable Joseph R. Biden, Jr.
Chairman,
Committee on the Judiciary
United States Senate
July 10, 1987

For one semester, I worked as a full-time consultant to the White House Domestic Policy Staff during the administration of President Carter. I have often disagreed with Professor Siegan, but have always found him open-minded and flexible. He is definitely not an ideologue.

I have absolutely no reservations about Professor Siegan's fairness, objectivity, personal integrity, and dedication to legal scholarship and the legal profession. He is one of the most reliable and responsible individuals I have ever met.

In short, I cannot recommend Professor Siegan more highly for an appointment to the Ninth Circuit.

Respectfully,

William K.S. Wang

William Kai-Sheng Wang
Professor of Law

cc. The Honorable Strom Thurmond
United States Senate

Professor Bernard Siegan
University of San Diego Law School

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

JULIAN H. LEVI
Professor of Law

May 6, 1987

Senator Joseph R. Biden, Jr.
489 Russell Building
Washington, D.C. 20510

Dear Senator Biden:

I write to you in support to the nomination of Bernard Siegan to the Ninth Circuit Court of Appeals.

Prior to my coming to Hastings College of the Law, I served on the faculty of the University of Chicago as Professor of Urban Studies.

Bernard Siegan in 1969 was a Fellow in Law and Economics at the University of Chicago Law School. His work was in the field of zoning with which I had some familiarity in work I had undertaken on behalf of the University of Chicago in the Hype Park-Kenwood Community, and subsequently as chairman of the Chicago Plan Commission. Hence, I was requested to serve on the Siegan thesis committee, and I came to know Bernie very well.

I found him to be a person of great intellect and open-mindedness, and of high moral character. His thesis, subsequently published under the title of "Land Use Without Zoning," was a significant contribution to the literature in the field. I have followed his subsequent career in academia with interest. He is a first rate scholar of the Law. At the same time, he is not an ideologue. He is interested in differing points of view and has the intellectual honesty and courage to reexamine his positions.

In short, Bernard Siegan meets the standards for judicial appointment we all support. I hope the Senate, in its wisdom, confirms his appointment.

Sincerely,

Julian Levi

[redacted] • SAN FRANCISCO, CALIFORNIA 94102-4978 • (415) 565-4661

SOUTHWESTERN
UNIVERSITY
SCHOOL OF LAW
1911 1986

June 30, 1987

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

RE: BERNARD SIEGAN

Dear Senator Biden:

As Mr. Siegan's and my career paths have been crossing for more than forty years, I feel that I am in a unique position to comment on his qualification for high judicial office. I recommend him wit out hesitation or reservation, and I am pleased to do so.

Mr. Siegan and I first met in the early 1940's when we were both students at Marshall High in Chicago and both of us were involved in student government matters. We became friendly then, and have been on a cordial basis ever since, although we are not close friends who see one another frequently.

Our next contact was in September, 1943 at Camp Maxey, Texas. We were both in military service and had been sent to Camp Maxey for processing and shipment to the army college training program. We were assigned to work together as janitors for several of the post movie theaters. Not a bad detail as those things went, and we would reminisce afterwards about our boss, a Corporal Page.

We met again after the war at the University of Chicago. Indeed, it was Mr. Siegan's enthusiasm there for the law that influenced my own decision to go to law school. After that, we occasionally met as practicing attorneys in the Chicago area, particularly during one period during the late 50's or early 60's when I was an officer in a Skokie home-owners' group and Mr. Siegan represented clients interested in real estate development there. In recent years both Mr. Siegan and I have, coincidentally, become law professors in Southern California, he in San Diego, I in Los Angeles. We happened to meet once recently, in 1985 or 1986, when he was visiting Los Angeles.

675 South Westmoreland Avenue Los Angeles, California 90005-3992 (213) 738-6700

On the basis of the foregoing, I would assert that I know Mr. Siegan fairly well. Among his many good qualities are three that are outstanding and that, in my opinion, eminently qualify him for the post for which your committee is considering him. Those three qualities--and I deliberately give them capital letters--are Integrity, Resourcefulness and Intellect.

I have never known, nor heard of any instance, of Mr. Siegan going back on his word. Even in high school, he had that basic responsibility of character that made him never to promise what he could not deliver. That says a great deal, I believe, about a person, especially when one considers what immature high schoolers will do to gain popularity.

As to his Resourcefulness, I have found over the years that Mr. Siegan has a capacity for devising innovative solutions to problems and for finding just those steps that are most appropriate for achieving those solutions. On reflection, that is the sort of bent of mind that we want from judges on a high appellate court.

I am sure that you have been furnished abundant evidence of Mr. Siegan's intellectual credentials, so I need not supply any here. I should say that, although he is both learned and intelligent, I have to consider Mr. Siegan misguided in some of his notions. My practice has involved a fair amount of administrative law work, and my political philosophy leans to the New and Fair deals and the enlightened pragmatism we knew during an era some now call "Camelot," so I do not hold the preference for deregulation and market solutions that Mr. Siegan has. Nevertheless, I find comfort in three observations concerning Mr. Siegan's philosophical predilections: the man is honest; the man is smart and can learn; and maybe my own philosophy does not have a hundred percent of the truth.

As a lawyer and thus an officer of the court, I would feel our legal system is well protected with a judge like Bernard Siegan on the bench.

Sincerely,

Arthur Brody

Arthur Brody,
Professor of Law
Southwestern University
School of Law

AB/sjm
cc: Honorable J. Strom Thurmond

Siegel & Warnock
ATTORNEYS AT LAW
39 SOUTH LASALLE STREET
CHICAGO 60603
TELEPHONE 263-2060

JACK M. SIEGEL, P.C.
WILLIAM R. WARNOCK, P.C.

June 15, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Senator Biden:

I write to you to urge the confirmation of Bernard Siegan as a judge of the Ninth Circuit Court of Appeals. I am aware that confirmation hearings are scheduled for Mr. Siegan before the Judiciary Committee in the near future. I have known Mr. Siegan, both professionally and personally, for more than twenty-five years. He is a man of great intellectual capacity and unquestioned integrity. His temperament and intellect will make him an outstanding appellate judge.

My particular legal specialization is in the field of municipal and constitutional law. I am the corporation counsel for the City of Evanston and village attorney of Arlington Heights, Schaumburg and Riverwoods, all located in the Chicago metropolitan area. In representing municipalities, I have had frequent opportunity to deal with the areas of land use and constitutional law in which Mr. Siegan is a recognized specialist. I have had the privilege of arguing before the United States Supreme Court and appear frequently in the Seventh Circuit and the federal district court on municipal constitutional matters. I thus feel that I am in a position to judge Mr. Siegan's qualifications in these areas independently of my personal admiration for him.

I hope that the Committee will act expeditiously and favorably on Mr. Siegan's nomination. He will be an ornament to the federal bench and will serve with great diligence and honor.

Very truly yours,

Jack M. Siegel

Jack M. Siegel

JMS:rp

cc Senator Strom Thurmond

ARNOLD & PORTER
1200 NEW HAMPSHIRE AVENUE, N. W.
WASHINGTON, D. C. 20036
(202) 872-6700
CABLE: "ARFOPO"
TELECOPIER: (202) 872-6720
TELEX: 89-2733

1700 LINCOLN STREET
DENVER, COLORADO 80203
(303) 863-1000

900 THIRD AVENUE
NEW YORK, NEW YORK 10022
(212) 593-2772

MILTON V. FREEMAN
DIRECT LINE: (202) 872-6896

JUN 12 P4:55

June 12, 1987

By Hand

Honorable Joseph R. Biden, Jr.
Chairman, Senate Judiciary Committee
Russell Senate Office Building
Room 489
Washington, D.C. 20510

Dear Senator Biden:

I make this statement in support of the confirmation of Professor Bernard Siegan to the position for which he has been nominated as a Judge of the United States Court of Appeals for the Ninth Circuit.

I have known Professor Siegan for a period of eight years. I first met him when I was a Visiting Scholar at the University of San Diego School of Law where he is a Distinguished Professor of Law. I spent the months of January to April 1979 at the University of San Diego during a sabbatical from my law practice and I got to know Professor Siegan very well. I regard him as a good friend. I have discussed with him various aspects of the law. I have also read a number of his articles and other writings.

It is clear to me that Professor Siegan is an able, indeed a distinguished scholar, a careful student of the law and a man who makes his own independent judgments in a calm and judicial manner. He listens most carefully to the views of others and is open in discussions. He is an open, friendly and compassionate person, and I would trust him to do justice fairly and according to law in any matter that came before him.

While I myself grew up in the liberal traditions of the New Deal and find Professor Siegan's views, particularly on rights of property, at variance with my own at some points, I have no question that his views are well within the spectrum of the mainstream of American law.

Indeed a decision yesterday by a broad spectrum of the Supreme Court Justices on the doctrine of eminent domain under the Fifth Amendment is closer to Professor Siegan's views than they are to my own.

But whether he is right or wrong on any subject is beside the point. He possesses in a high order the qualifications of legal skill and judgment necessary for the office for which the President has nominated him.

The American Bar Association, after its usual careful examination, has found him qualified for this position, the highest ranking normally given to nominations of persons holding academic positions.

As a statement of my own background, I am a senior partner of the law firm of Arnold & Porter in Washington, D.C. I have practiced law for over fifty years and have appeared before a great many judges in courts at every level. I believe that I have sufficient knowledge and background to make the statement that I do, namely that Professor Siegan is indeed qualified, I would say well qualified, to sit on the Ninth Circuit, and that I would have confidence in his character, his integrity, his humanity and his level of skill and judgment to do justice at the highest level.

I am taking the liberty of sending a copy of this letter to Senator Thurmond.

Very truly yours,

Milton V. Freeman

CENTER FOR STUDY OF PUBLIC CHOICE
St. George's Hall

(703) 323-3774

George Mason University
4400 University Drive
Fairfax, Virginia 22030

JUN -8 PM 2:5

3 June 1987

Senator Joseph R. Biden, Jr.
Chairman, Senate Judiciary Committee
489 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I am writing to endorse the judicial nomination of Professor Bernard Siegan, University of San Diego Law School.

I know Professor Siegan personally, and I am also familiar with his work. He is an outstanding legal-constitutional scholar, whose work reflects a fine basic understanding of the American legal structure. He would be a credit to the judiciary.

Sincerely yours,

James M. Buchanan
University Distinguished Professor
and General Director
(Nobel Laureate in Economic Science, 1986)

Milton Friedman
Senior Research Fellow
Hoover Institution (Stanford, CA)
(Nobel Laureate in Economic Science, 1976)

/bht
cc: Senator Strom Thurmond

Alan M. Dershowitz Harvard Law School
Cambridge, Massachusetts 02138
617-495-4617

May 21, 1987

Senator Joseph R. Biden, Jr.
Russell Senate Office Building, SR-489
United States Senate
Washington, D.C.
20501

Dear Senator Biden,

I am advised that the Senate Judiciary Committee is considering the President's nomination of Professor Bernard Siegan to the United States Court of Appeals for the Ninth Circuit. Although I do not always agree with Professor Siegan's approach to the Constitution, I have been intrigued by the ingenuity, consistency and sincerity of his arguments. His commitment to liberty and his unwillingness to distinguish among types of liberty make his views appear quite conservative. But his methodology is libertarian, and he seems truly dedicated to keeping government off our backs not only when property is at issue, but when any liberty is threatened by the state. My discussions with him have confirmed the impression conveyed by his writings, that he is a principled and intellectually honest scholar of liberty.

If the judiciary were to be dominated by any one approach -- whether it be that of Professor Siegan or anyone else -- there might be cause for concern. But his are indeed iconoclastic views, not widely shared by judges and academics. Some of my friends and colleagues argue that Professor Siegan should not be confirmed precisely because his views are not mainstream. I believe that there is room in the judiciary for a wide array of acceptable views. Indeed, I do not believe that any single orthodox view of Constitutional adjudication should be deemed the established or mainstream one, so long as the nominee has a commitment to protecting liberty and individual rights. I am confident that Professor Siegan fits comfortably within this criterion.

There can be little doubt that Professor Siegan is a brilliant scholar and a person of high energy and enthusiasm about his work.

It would be a mistake, in my view, to single him out for partisan opposition because the end result of his libertarian philosophy may be judicial decisions that are sometimes conservative in outcome and favorable to property rights. I suspect that his philosophy will also produce decisions favorable to personal rights. But on a more fundamental level, any opposition to Professor Siegan would have to focus on his somewhat controversial philosophy of liberty, and that would contribute to a dangerous precedent.

Please feel free to call or write me for any further elaboration of these views.

Sincerely,

Alan M. Dershowitz

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

18 February 1988

Dear Senator:

Professor Bernard Siegan has been nominated for an appointment to the Court of Appeals for the Ninth Circuit and will appear before the Judiciary Committee shortly for its advice and consent. I have known Siegan for many years and wish to vouch for him. I need not share his jurisprudential outlook to be able to assure you that he is in the mainstream of legal thought, not given to crusades for wholesale revision of constitutional doctrine, thoroughly wedded to Anglo-American principles of stare decisis, and recognizes that the role of the intermediate appellate judge is to keep the trial courts in line with their and his masters' voices, those of the Supreme Court.

Like others who already serve on the federal bench, he is not unaware of economic elements in contemporary jurisprudence, but I do not think he would abdicate the role of the courts to the control of the marketplace. And I think he would, if he could, expand the area of individual rights but within the confines created for him by the Court. I am certain that he is not contaminated by any prejudice based on race, creed, color or gender. In sum, he is a conservative scholar, learned in the law and prepared to serve it in the tradition of Jackson and Harlan. I commend him to you.

Sincerely,

Philip B. Kurland

Senator Joseph Biden, Chairman
Judiciary Committee
United States Senate
Washington, DC 20510

PBK/s

Michael Pancer
ATTORNEY AT LAW
625 BROADWAY, SUITE 1135
SAN DIEGO, CALIFORNIA 92101-5418

(619) 236-1826

MAY 19 AM 9:04
SENATE JUDICIARY COMMITTEE
MAY 19 1987

May 14, 1987

Senator Joseph Biden
(Delaware)
Senate Office Building
Washington, D.C.

Dear Sir:

It is the purpose of this letter to recommend for appointment to the Ninth Circuit Court of Appeals Professor BERNARD SIEGAN.

Professor Siegan is a well known and respected legal scholar in the San Diego area.

I have been practicing law in San Diego for approximately 15 years and have come to know Professor Siegan's legal skills through his writings, reputation and by personal discussion.

As a practicing attorney, it is clear to me that Professor Siegan possesses those qualities that would enable him to perform at the highest level as an Appellate Court Justice.

My specialty of law is in criminal defense and I have been active with the American Civil Liberties Union (a Past President of the Legal Panel and Past President of the Local Chapter). While I cannot speak for the American Civil Liberties Union, I mention my activities with them to demonstrate my concern in general for the principles of civil liberties. With this background, I have complete confidence that Professor Siegan will serve most fairly as a Justice. He is most concerned with the liberties of all citizens and has written extensively of this concern.

It is laudable that his concern for civil liberties is consistent. He recognizes and will protect, when just, the personal liberties and property rights of all citizens.

Professor Siegan also possesses an even temperament

and a willingness to debate without rancor. Such characteristics will make him an effective and welcome member of a deliberative body. He is committed to high ideals and he has shown that he can listen and be persuaded by fair argument. Certainly he possesses all of the qualities we would ask of a Justice.

Please contact me if I can answer any question or provide further information.

Yours truly,

Michael Pancer

MP:sd
cc: Senator Strom Thurman (N.Carolina)

JONES, DAY, REAVIS & POGUE

AUSTIN
CLEVELAND
COLUMBUS
DALLAS
LONDON
LOS ANGELES
NEW YORK
PARIS
RIYADH

(SURREY & MORSE)
METROPOLITAN SQUARE
655 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005-5701

TELEPHONE: 202-879-3939
TELEX: DOMESTIC 892410
TELEX: INTERNATIONAL 64393
CABLE: ATTORNEYS WASHINGTON
TELECOPIER: 202-626-1700
WRITER'S DIRECT NUMBER:

(202) 879-3787

890200-202-001
7240:pmh:1312Z

March 26, 1987

The Honorable Joseph R. Biden
United States Senate
489 Senate Russell Building
Washington, D.C. 20510-0801

Dear Senator Biden:

As one who is familiar with Professor Bernard Siegan's scholarship, I am pleased to write you supporting his nomination to the 9th Circuit. I became familiar with his work while serving as a law professor at the University of Virginia and dean of the law school at Case Western Reserve University.

Professor Siegan is a careful and thoughtful scholar whose writings in Constitutional Law and Law and Economics have earned him an envied reputation. He is a person whose intellectual ability and character are highly regarded. In my view, his record entitles him to support and confirmation as a member of the U.S. Court of Appeals for the 9th Circuit.

I therefore am pleased to join with many others, including Dean Donald T. Weckstein and Dean Sheldon Krantz of the University of San Diego Law School, in endorsing his candidacy. If I can provide further information, please do not hesitate to contact me.

Sincerely,

Ernest Gellhorn

Ernest Gellhorn

Diocesan Office
for Apostolic Ministry / Alcala Park

January 13, 1988

Honorable Joseph R. Biden
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Re: Nomination of Bernard Siegan to
the U. S. Court of Appeals

Dear Senator Biden:

It is my great pleasure to write this letter of support for the appointment of Professor Bernard Siegan to the Ninth Circuit Court of Appeals. While you are no doubt aware of Professor Siegan's outstanding professional achievements, I wish to bring to fore the quality of Professor Siegan's personal integrity.

Professor Siegan has consistently given generously of his talents to our community. In addition to those civic efforts given to the community at large, Professor Siegan gives of himself most compassionately and personally to his fellow man.

I believe Professor Siegan to be of uncompromised strong moral fiber and by this letter urge his confirmation.

With every best wish, I remain

Sincerely yours,

+Leo T. Maher

+Leo T. Maher
Bishop of San Diego

cc: Senator Strom Thurmond

BPW usa

The Oregon Federation of Business and Professional Women's Clubs, Inc.

Reedsport-Gardiner Business & Professional Women's Club, P.O. Box Reedsport, OR 97467

January 25, 1988

Senator Joseph Biden, Chair
Senate Judiciary Committee
224 Dirksen
Washington, D.C. 20510

Re: Nomination of Bernard H. Siegan, Ninth Circuit Court of Appeals Nomination

Dear Senator Biden:

The Oregon Federation of Business & Professional Womens Club Inc. is asking that you and the Senate Judiciary Committee carefully scrutinize the background and philosophy of Bernard H. Siegan. Professor Siegan's feeling on such constitutional issues as equality in education and employment are well documented. He has stated his disagreement with decisions regarding equal protection and due process under the law, economic regulation and the First Amendment. His position on the Ninth Circuit Court of Appeals would set history back, especially for women and minorities, nearly two hundred years. The working women of America, and the minorities, deserve much better than to have a judge that has a personal agenda of this type.

Please look to confirming nominations of those individuals who will look at the merits of the cases that come before them. The Ninth Circuit Court of Appeals has a far ranging impact in their decisions. Therefore, your decision will play a large part in the future of our state and this nation.

Sincerely,

Lynn M. Nelson

LYNN M. NELSON
OFBPW Legislation Chair

CC: Senator Robert Packwood, Oregon
Senator Mark Hatfield, Oregon
Beth Wray, BPW/USA President
Kathleen Jordan, OFBPW President

THE FOLLOWING ORGANIZATIONS AND INDIVIDUALS HAVE ENDORSED THE ATTACHED REPORT

Organizations

Center for Law in the Public Interest
Los Angeles, California

Natural Resources Defense Council
New York, New York

San Francisco Tomorrow
San Francisco, California

Sierra Club
San Francisco, California

Sierra Club Legal Defense Fund
San Francisco, California

1000 Friends of Oregon
Portland, Oregon

Environmental Law Experts*

Kathryn Burkette Dickson
Attorney-at-Law
San Francisco, California

Jeffrey Glick
Attorney-at-Law
San Francisco, California

Ralph W. Johnson
Professor of Law
Univ. of Washington School of Law
Seattle, Washington

John Leshy
Professor of Law
Arizona St. Univ. College of Law
Tempe, Arizona

Andrea Peterson
Acting Professor of Law
Univ. of California School of Law
Berkeley, California

Priscilla Robinson
Executive Director
Southwest Environmental Service
Tucson, Arizona

Greg Thomas
Visiting Professor
Univ. of California School of Law
Los Angeles, California

* Affiliations with organizations or schools are for identification purposes only.

CENTER FOR LAW
IN THE PUBLIC INTEREST
10951 WEST PICO BOULEVARD
THIRD FLOOR
LOS ANGELES, CALIFORNIA 90064-2186
TELEPHONE: (213) 470-3000

LEGAL STAFF
LISA FOSTER
CARLYLE W. HALL, JR., CO-DIRECTOR
BILL LANN LEE
JOHN R. PHILLIPS, CO-DIRECTOR
JOEL R. REYNOLDS
FREDRIC D. WOOCHER

OF COUNSEL
GEOFFREY COWAN
LUCAS GUTTENTAG
SUSAN S. JACOBY
HELENE T. SHOOKLER

ADMINISTRATIVE OFFICER
RUTHANN LEHRER

VISITING FELLOWS
ELIZABETH M. BROWN
EVAN H. CAMINKER
VALERIE C. HINK
DAVID HUEBNER

AN ANALYSIS OF BERNARD SIEGAN'S JUDICIAL PHILOSOPHY ON LAND USE REGULATION AND THE FEDERAL CONSTITUTION

Bernard Siegan's extremist judicial philosophy is among the most controversial held by any prospective judge nominated by any President to the federal appellate courts. Among the most troubling are his radical views on land use law and the federal constitution. Siegan advocates a far-rightest judicial activism that would strike down a myriad of local planning and zoning ordinances -- including most local growth control and environmental protection measures -- as unconstitutional "takings" of private property. Because the United States Supreme Court has decided only a few land use cases in the 20th century, federal and state appellate judges have authored most of the decisions that form the constitutional underpinnings of modern planning and zoning in America. His nomination thus assumes a special importance to planners and elected local officials and to environmental and other public interest organizations.

BOARD OF TRUSTEES

In other areas of economic regulation, Siegan would essentially turn back the clock to the now widely repudiated pre-1937 "Lochner era," when the United States Supreme Court used the theory of substantive due process to invalidate some 200 federal and state regulatory laws.[1/] When local planning and zoning regulations impact private property, however, Siegan views even Lockner-era Supreme Court precedent as insufficiently protecting the economic rights of property owners and developers.[2/]

The United States Supreme Court first established the constitutional framework of local planning and zoning activities in Village of Euclid v. Ambler Realty Co. There, the Court ruled that "before [a zoning] ordinance can be declared unconstitutional, [it must be shown by the plaintiff property owner to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[3/]

1/ In Lochner v. New York, 198 U.S. 45 (1905), for example, the Supreme Court ruled that a state law limiting the hours bakers could work unconstitutionally interfered with the employers' and employees' "liberty" to agree to working conditions. The Lochner era ended thirty-two years later when the Supreme Court upheld a minimum wage law, and began deferring to legislative authority to enact economic legislation. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Since then, the substantive due process theory has not been used to invalidate economic legislation, and, in this area of the law, the Lochner approach remains totally discredited. G. Gunther, Constitutional Law 540 (1980); L. Tribe, American Constitutional Law 446-55 (1978).

2/ Siegan, Opening Remarks, 14 Nw. Sch. L. Envtl. L. 645, at 652 (1984).

3/ Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Siegan claims that Euclid (and every other United States Supreme Court decision to date in the land use field) erroneously gives the "benefit of the doubt" to local municipalities. The result, according to Siegan, is that a municipality "can do almost anything it wants to do concerning zoning." He also sees sixty years of federal cases following the Euclid standard as "excessively curtail[ing] the rights of property owners and otherwise prevent[ing] the market from operating on behalf of housing consumers."[4/] Siegan decries the federal courts' failure to check what he calls the "evils and errors of zoning," because, as he bluntly puts it, "the market is better suited for determining the optimum use of land than is the political process." "Investors, lenders, builders and developers risk their own funds and tend to be specialists in their field," Siegan says, so they "will seek to use resources more efficiently and with minimum waste, at least as compared to those in the public sector." In contrast, Siegan contends, "the public, planners and politicians have little, if any, personal stake in efficiency, and may even profit in terms of job promotion, political advancement, or personal satisfaction from wasteful practices and inefficient application of resources in the development of property."[5/]

Nor does Siegan give much, if any, credence or weight to the interests of the public in environmental protection and

---

4/ Siegan, Opening Remarks, at 653.

5/ Siegan, "The Anomaly of Regulation Under the Taking Clause," Planning Without Prices 27 (Lexington Books 1977).

orderly planning. "Super-libs," Siegan urges, are "among the strongest backers of tough state and federal land use controls" whose "biggest beneficiaries are the well-to-do and the rich."6/ Basically, Siegan asserts,

> "environmentalists want land to remain undeveloped so they can hike and camp on it . . . . Many of the rich are seeking strict government controls allegedly to protect the environment . . . [but] if they are successful, these wealthy people will help bring about a [government] dedicated to furthering and enhancing the life-style of those who have achieved, and are no longer seeking, material success." 7/

In the same vein, Siegan conjectures that the laws adopted by the federal government and many state and local governments requiring environmental impact assessment of proposed governmental actions simply give "anyone who dislikes a contemplated governmental project, an opportunity through litigation, to delay or even defeat it."8/ "Naderites" and "dedicated environmentalists" "border on the irresponsible," Siegan asserts, by seeking to use environmental protection laws to introduce quality of life/quality of the environment factors into governmental decisionmaking. According to Siegan, when qualitative factors such as "waterfront and scenic terraine" must be considered and weighed as part of a governmental decision, along with a strictly quantitative "calculation of

---

6/ Siegan, "Hope vs. Experience," Orange County Register (Sept. 22, 1974).

7/ Siegan, "Special Interests," Orange County Register (Mar. 28, 1976).

8/ Siegan, "Case of Defense," Orange County Register (Jan. 10, 1975).

costs and benefits," this approach "throws out of the window any rational evaluation of trade-offs and competing interests involved."[9/]

Similarly, Siegan believes that attempts by local governments to promote orderly planning simply reflect the "special interests" and "self interest" of local residents. The Ramapo, New York type of phased growth ordinance upheld by New York's highest court in 1972[10/] -- and now utilized by hundreds of cities and counties throughout the country -- represents for Siegan the use of the local police power not to preserve the public health, safety, morals or welfare, but "solely to save the community's funds."[11/] Such local growth management ordinances, Siegan says, merely seek to use a "subterfuge, loophole or escape hatch" in federal constitutional "takings" jurisprudence to benefit the community "at the expense of the individual owner."[12/]

Instead, Siegan proposes that the federal courts should use the "taking" clause of the United States Constitution to require local governments to fully compensate the property owner whenever their planning, zoning and other regulations diminish private property values -- unless the regulations are shown by the locality to be "necessary to achieve a vital and

---

9/ Siegan, "Environment and Energy," Orange County Register (June 22, 1975).

10/ Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

11/ Siegan, Planning Without Prices, at 21.

12/ Id. at 37.

pressing governmental interest,"[13] in other words, what Siegan describes as an "extraordinarily good reason" for every regulation of private land.[14] This newly created burden of proof in constitutional litigation would now require local governments to prove in court that, as Siegan puts it, their land use regulations are "truly necessary to protect the public health, safety, morals or welfare."[15] If they cannot meet this heavy burden, Siegan would declare them guilty of unconstitutional "takings" of private property for which they must compensate the affected property owners.[16] Siegan candidly acknowledges that his proposed standard of judicial scrutiny of local land use regulations is "different" and "far higher" than the standard of review uniformly followed by the United States Supreme Court and by all other federal and state courts since the Euclid case sixty years ago.[17]

Beyond this, no federal court to date has held -- nor have virtually any reputable land use scholars urged -- that mere diminishment of private property values by local land use regulations can be the basis for claims for compensation due to

---

[13] Siegan, "Economic and Property Rights," The Supreme Court's Constitution: An Inquiry Into Judicial Review and Its Impact on Society 45 (Transaction Books 1987).

[14] Siegan, Opening Remarks, at 653, 660.

[15] Siegan, The Supreme Court's Constitution at (emphasis in original).

[16] Id.

[17] Siegan, Opening Remarks, at 653, 660.

so-called unconstitutional "taking."[18/] Siegan, however, claims that the federal constitution forbids "limitations on private ownership except upon payment of compensation or when necessary to achieve vital and pressing governmental interests."[19/] As Siegan interprets the "takings" clause of the federal constitution, "a person's property should not be diminished without compensation unless government has an extraordinarily good reason for doing so."[20/]

In First Evangelical Lutheran Church v. Los Angeles County, 107 S.Ct. 2378 (1987), the U.S. Supreme Court recently ruled that excessive local zoning regulations can result in a successful "inverse condemnation" claim for money damages under the "takings" clause, when the regulations unreasonably destroy subtantially all of the property's use and market value. Prior to First Evangelical, the Court had not expressly addressed the issue of when and if money damages must be paid as compensation for regulatory takings, and many scholars and lower courts had concluded that only equitable (non-monetary) relief, such as enjoining enforcement of the improper regulation, should be

---

18/ In Euclid, for example, in which the constitutionality of zoning was originally established, an alleged loss of hundreds of thousands of dollars caused by the zoning classification of the property was not sufficient in itself to cause the Court to declare the ordinance invalid.

19/ Siegan, "The Law and the Land," Private Rights and Public Lands, 15 (1983), Heritage Foundation.

20/ Siegan, Opening Remarks, at 654, 600.

available.[21/] Notably, while enunciating the new remedial rule, the Court was especially careful to admonish in First Evangelical that it was not altering its precedents regarding a local government's defenses or burden of proof when its regulatory activities are challenged by the affected property owner a "takings."

Nevertheless, when coupled with First Evangelical's authorization of the federal courts to award money damages for so-called regulatory "takings" to plaintiff property owners under limited circumstances, Siegan's activist views could substantially imperil the treasuries of local governments engaging in local planning and zoning:

- Siegan would require localities to successfully carry the heavy burden of proof of showing that their planning and zoning regulations are truly and vitally necessary to prevent nuisance-like private activities. Local growth management ordinances would fail, as a matter of law, to meet this burden of proof.

- If they fail to meet Siegan's heavy new evidentiary burden, he would require localities to fully compensate property owners and developers for the diminishment of value caused by their planning and zoning actions.

The ensuing financial bonanza to property owners and developers could potentially flood the federal courts with alleged

---

21/ See, e.g., HFH, Ltd. v. Superior Court, 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365 (1975). See generally F. Bosselman, D. Callies and J. Banta, The Taking Issue (Washington: Government Printing Office, 1973).

"takings" cases -- at least those in the Ninth Circuit where Siegan would adjudicate the claims. Notably, the U.S. Supreme Court can accept for review only a tiny fraction of all Circuit Court of Appeals decisions, and, historically, in the past sixty years it has granted review in only a handful of land use cases. Consequently, Siegan's peculiar and extremist constitutional views on the "takings" clause could significantly shape the framework of land use adjudication throughout the West.

Over 95% of all American municipalities with populations of 5000 or more use zoning to regulate land use on private land.[22/] Many of these would doubtless be forced to suspend further planning and zoning activities if Siegan's views became operative. For the past twenty years, Siegan (who says he has "always been a critic of land use regulation")[23/] has argued that local planning laws, zoning ordinances, building codes and other regulations should be abolished because he believes they excessively interfere with the private market decisions of property owners and developers.[24/] Siegan's proposed "takings" constitutional test -- revolving around proof that regulatory actions are "truly necessary" to meet "vital"

22/ U.S. National Commission on Urban Problems, Building the American City, 208-09 (1969).

23/ Siegan, Opening Remarks, at 645.

24/ See, e.g., Siegan, The Houston Solution: The Case for Removing Public Land Use Controls, 4 Land Use Controls Q. 1 (1970); Siegan, Non-Zoning in Houston, J. of L. and Econ. 71 (19__); Siegan, "The Anomaly of Regulation Under the Taking Clause," Planning Without Prices; Siegan, Opening Remarks at 646-51; Siegan, Commentary on Redistribution of Income Through Regulation in Housing, 32 Emory L. J. 721 (1983).

and "pressing" concerns -- is subjective and difficult to meet, giving a result-oriented extremist judge a very wide latitude in striking down local planning and zoning actions while awarding enormous sums of money damages to real estate development interests. What Siegan has been unable to accomplish through the legislative process by his brand of shrill name-calling and right-wing ideological rhetoric, his nomination to the Ninth Circuit Court of Appeal may now be able to accomplish through judicial activism, using the clear blueprint spelled out in his many land use writings.

Carlyle Hall
12/28/87

REPORT ON THE NOMINATION OF BERNARD SIEGAN

FOR THE NINTH CIRCUIT COURT OF APPEALS

Submitted by the following organizations:

Alliance For Justice
American Federation of Labor-Congress of Industrial Organizations
American Federation of State, County and Municipal Employees
American Jewish Congress
American Humanist Association
Americans For Democratic Action
Americans For Religious Liberty
Catholics For a Free Choice
Center for Law in the Public Interest
Episcopal Women's Caucus
Equal Rights Advocates
Federation of Women Lawyers
Human Rights Campaign Fund
International Longshoremen's and Warehousemen's Union
International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, AFL-CIO
Latino Issues Forum
Leadership Conference on Civil Rights
Mexican-American Legal Defense and Education Fund
National Abortion Rights Action League
National Association for the Advancement of Colored People
National Education Association
National Organization For Women
National Organization for Women Legal Defense and Education Fund
National Women's Political Caucus
People For The American Way
Planned Parenthood
Project Vote
Public Advocates
Religious Coalition for Abortion Rights, Inc.
Union of American Hebrew Congregations
United Auto Workers
United Food and Commericial Workers International Union, AFL-CIO and CLC
Women's Legal Defense Fund

REPORT ON THE NOMINATION OF BERNARD SIEGAN
FOR THE NINTH CIRCUIT COURT OF APPEALS

This report is presented by a number of organizations in opposition to the nomination of Bernard Siegan for the Ninth Circuit Court of Appeals. Mr. Siegan, a 63-year old professor at the University of San Diego Law School, was nominated by President Reagan in January 1987. Before he began teaching in California in 1973, Mr. Siegan practiced real estate law in Chicago and was a research fellow in law and economics for one year at the University of Chicago Law School.

Bernard Siegan's writings make it plain that he takes an approach to the Constitution and to the role of the courts in passing on constitutional questions that has -- as Harvard Law School Professor Tribe put it -- "been repudiated by every serious student of the Constitution for over half a century." (San Diego Tribune, March 28, 1987, p. 1.)

The fact that Mr. Siegan's positions cannot bear scholarly scrutiny is only the beginning of the matter; more central is the fact that in four particulars Mr. Siegan's views run counter to the basic democratic values on which our government rests:

First, Mr. Siegan rejects the principle that the Fifth and Fourteenth Amendments provide black Americans full equality as citizens and not some watered down version called "separate but equal."

Second, and more generally, Mr. Siegan rejects the proposition that the Bill of Rights and the Fourteenth Amendment

impose on the courts a special obligation to protect the individual liberties spelled out there.

Third -- and in direct contradiction to his disagreement with judicial protection of personal liberties and without any regard to the unhappy experience in the first part of this century -- Mr. Siegan advocates an activist role for the courts based on some concept of substantive due process in passing on legislative actions regulating economic activity.

And, finally, Mr. Siegan would deny the Federal Government the power to do what is "necessary and proper" to deal with a variety of social problems that are undeniably of national scope.

In sum, Mr. Siegan would have the courts turn away from our commitment to fairness and justice for all without regard to race, creed and color; hobble the judiciary in the protection of rights most certainly written into our Constitution; limit the ability of the legislative branch to meet the economic and social challenges facing our society; and cripple the authority of the Federal Government. A person so disposed should not be a federal judge.

School Desegregation and the Fourteenth Amendment

Mr. Siegan asserts that the proper underpinning for the Brown v. Board of Education decision is the right to travel. "This right protects a person's opportunity to pursue happiness and well being through free access to places and areas throughout the nation." (The Supreme Court's Constitution: An Inquiry Into Judicial Review And Its Impact On Society, (Transaction Books,

New Brunswick) [hereafter "SCC"], p. 106.) It was the black child's right to travel into a white school and have access to its programs that was denied under the state supported segregated school system. If the Brown decision had been based on the right to travel, Mr. Siegan claims, the Supreme Court could have protected a natural right without infringing on the traditional responsibilities of the states; that is, the Court would have overturned laws which prohibited access of black children to the schools but would not have granted any positive remedies to provide these children access.

Mr. Siegan argues that the Fourteenth Amendment protects only "fundamental and natural" rights of life, liberty and property. In The Supreme Court's Constitution, he writes that the Fourteenth Amendment and the Civil Rights Act of 1866 "solely comprehended civil rights and not social privileges, voting, office holding, jury service, public schooling, or other political rights." (SCC, p. 89) "Although such segregation is totally repugnant in modern society, it does not follow that the Constitution necessarily provides relief in this area." (SCC, p. 106.)

In designing remedies to integrate the schools, the courts, according to Mr. Siegan, have usurped the role of Congress and the state legislatures. Mr. Siegan argues that after having decided Brown and granted the remedy of outlawing state supported school segregation, the Supreme Court should not have taken further remedial action. "Upon a finding of invalidity by the judiciary, the remaining problem shifted for resolution to the

other governmental branches ..." (SCC, p. 101.) In using its equitable powers to grant effective relief, the Court overreached its proper authority and overrode "the constitutional authority of the states." (SCC, p. 101.) Thus, according to Mr. Siegan, after a state has for decades violated the Constitution by segregating its schools, only the guilty state has the constitutional power to decide what, if anything, should be done to right the wrong. Thus, Mr. Siegan pays only lip service to Brown and its vital principle.

Mr. Siegan takes particular issue with the decisions which have required the states to take action to integrate the schools. His criticisms include the following:

> The result would be ... that parents who could not possibly be considered either as having violated the law or as having benefitted from a violation, would have their children bused, even against their wishes, to attend schools outside their neighborhoods. ... In many instances, school officials who instituted the condemned policies would have long departed their posts when remedial action was ordered.

Under Mr. Siegan's conception of the properly restricted role of the federal courts, the dual school systems would not have been dismantled as a result of the Brown decision. Black children would no longer be denied by law the right to attend white schools, but they would be limited in their access by the availability of space. If all of the white children continued to attend their neighborhood schools, only a very few black children would be able to get into those schools. Thus, the right to attend an integrated school would be illusory for the vast

majority of black children.*/

Mr. Siegan's "natural" versus "political" rights dichotomy would have devastating consequences for other types of civil rights cases as well. Because such rights as voting, jury service and equal housing are "political" rights and not "natural" rights, Mr. Siegan's world would allow all-white juries, all-white political primaries, racially restricted zoning, and enforcement of racially restrictive covenants in deeds.

The Bill of Rights and Fourteenth Amendment

Mr. Siegan does not take issue with just one or two of the Supreme Court's Bill of Rights decisions; rather, he disagrees with the law ensuring freedom of the press, nondiscrimination on the basis of sex, and separation of church and state.

For instance, Mr. Siegan claims that the history of the First Amendment shows that it was intended to be quite limited in scope. He states that "in the late 18th century freedom of

*/ This conclusion is supported by the data. A study conducted ten years after the Brown I decision showed that in the Southern states using freedom of choice plans, 98% of the black children continued to go to segregated schools. [cite] Indeed, even the example Mr. Siegan uses to show the success of freedom of choice in fact demonstrates its failure. Discussing the Green v. New Kent County School Board case, Siegan notes that under the freedom of choice plan, 115 black children were admitted to the white school along with 550 whites. (SCC, p. 102.) What he fails to mention, however, is that there were a total of 740 black school children in the area, meaning that nearly 85% of the black children were still going to all black schools. Under Mr. Siegan's freedom of choice remedy, the vast majority of black children in this country today would be attending segregated schools.

speech and press had a very restricted meaning in the common law" and concludes that "[c]learly, the First Amendment did not originate as a great bastion of freedom." ("Rights of Journalists," Orange County Register, Nov. 19, 1978.)

Mr. Siegan returns to this theme again and again. One example follows:

> The history of the Fourteenth Amendment indicates that its framers were much more concerned about the right of property than of expression. In contemporary times, the high court has reversed this priority. The outcome is attributable entirely to the beliefs and perspectives of a majority of the justices and not to constitutional language or history. "The First And The Fifth," Orange County Register, January 7, 1979.)

In The Supreme Court's Constitution, Mr. Siegan objects to the protection of the press from libel suits unless there is a showing of malice. He says that the Supreme Court in New York Times v. Sullivan and later decisions has "asserted authority to change the then prevailing balance between federal and state governments with respect to the rights of expression and reputation. The existence of the constitutional basis for such power is doubtful." (SCC, p. 175.) Moreover, he states that "Sullivan is an illustration of those troubling cases in constitutional law that make application of precedent extremely troubling for some judges." (p. 168) One wonders whether he would be a judge who would have trouble applying the precedent of Sullivan. Indeed, as will be demonstrated below, Mr. Siegan is so firmly wedded to his dissenting positions that it is questionable whether he would fairly be able to apply precedent in a wide variety of cases.

Mr. Siegan also takes issue with the application of the Establishment Clause to the states, writing that "[t]he U.S. Supreme Court has never authored a majority opinion that provides a reasoned explanation for why the Fourteenth Amendment's due process clause incorporates the establishment provision." (SCC, p. 120) In fact, Mr. Siegan suggests that "[c]onsiderable controversy remains over whether the framers intended to incorporate protection of religious freedom within the fourteenth amendment." (SCC, p. 122)

Mr. Siegan goes on to dispute the merits of the doctrine that there should be a "wall of separation" between church and state. The Establishment Clause, he asserts, "was a provision fashioned to secure the autonomy of the states in establishment matters, not to curtail it." (SCC, p. 122.) Under his analysis, "not every establishment of religion is a violation of freedom." (SCC, p. 122.)

Mr. Siegan also broadly disagrees with the Supreme Court's decisions forbidding sex discrimination. He particularly objects to the use of the intermediate level of scrutiny instead of the minimal standard of review in these cases. His criticisms are largely economically based, because decisions invalidating discrimination on the basis of sex often impose costs on the government. In discussing the Weinberger v. Weisenfeld decision, which challenged a provision of the Social Security laws which treated surviving male and female spouses differently, Mr. Siegan states, "[w]hen figures of this magnitude are revealed, the case can no longer be regarded as confined to the settling of gender

equities. ... A definitional equality in gender is being protected at a price -- possibly a very significant one." (SCC, p. 141.) It is interesting to note that Weisenfeld was one of the very few gender discrimination cases decided unanimously by the Supreme Court. Mr. Siegan would allow Congress to decide that it is preferable to assume that all wives are dependent but require husbands to prove dependency for receipt of benefits, rather than to go to the expense of making all spouses prove dependency. The fact that this assumption means that wives who pay into the Social Security system for their entire working life get fewer benefits than husbands get for their contributions does not bother Mr. Siegan. (SCC, p. 144) In a newspaper column, Mr. Siegan criticizes Title VII of the Civil Rights Act as simply another regulatory scheme which hurts industry and increases costs. He concludes, "[t]hus, Title VII joins the long list of government programs whose principal accomplishment is the imposition of higher prices and the acceleration of inflation." ("Failure of Anti-Discrimination," Orange County Register, January 28, 1979.)

Mr. Siegan's overall point in this regard is that the courts should consider the economic costs before overturning legislation which discriminates against particular classes of people. For example, he takes issue with the decisions in which the Supreme Court invalidated a Texas law denying free public education to children of illegal aliens, struck down laws which denied welfare benefits to those who had resided in the jurisdiction for less than a year, and required a state to grant an evidentiary hearing

to a recipient before terminating welfare benefits. In discussing the Texas case, Mr. Siegan says that the Court "made its decision upon one basis alone -- the perceived impact upon certain children of denying them a free education -- which is but a single facet of a complex problem." ("The Supreme Court: The Final Arbiter," Beyond the Status Quo, Cato Institute, Washington D.C. 1985, p. 285.) [hereafter "Cato".] He criticizes the ruling allowing welfare recipients a due process hearing in the same terms: "The Court was again considering but one facet of a complex problem ... evidentiary hearings are costly ..." (Cato, pp. 285-6.)

In the chapter "Abortion and Sexual Privacy," in The Supreme Court's Constitution, Mr. Siegan states that there is no constitutional basis for the due process analysis by which the Supreme Court has held government to a high standard of justification for laws limiting personal privacy and liberty. (SCC, pp. 154-6). He also reiterates his belief that the Constitution provides greater protection for economic rights than personal rights. Although he insists that a privacy right does exist under the Constitution, Mr. Siegan offers no exposition of that right.

Economic Regulation By The Legislature

Economic values and property rights are indeed the centerpiece of Mr. Siegan's writings. As one commentator noted in a review of his book Economic Liberties and the Constitution (University of Chicago Press, 1980)[hereafter EL&TC]:

> "[f]or example, Siegan feels that Justice Douglas could have reached the Griswold result on the basis that the relevant statute infringed a liberty of contract in the sale of contraceptives. This misses the point that, contrary to the teachings in much of law and economics, not all rights in life can be commercialized. Why doesn't Siegan go further to argue that Roe v. Wade should be based on infringements of the doctors' liberty of contract to sell abortions?" Paul Brietzke, Book Reviews, Valparaiso University Law Review, Vol. 16, 1982, p. 429 [footnotes omitted].

This same reviewer further notes that the concept of equality "does not even merit an entry in the index to Siegan's book, although constitutional history tends to throw liberty/equality conflicts into sharp focus." Book Reviews, p. 433.

Consistent with this emphasis, the heart of Mr. Siegan's agenda is to revive the doctrine that the courts sit to safeguard the interests of businessmen and property holders from the legislature. He frequently complains that the Supreme Court gives more protection to individual rights than to property rights:

> Regardless of constitutional language and purpose, the Court has its own preferences on liberties, giving some very high, and others very low, priority. ... the Supreme Court has its own hierarchy of liberties that cannot be explained by reference to constitutional wording or intent. ... This means that legislatures have great difficulty in restraining freedom of speech or press, and almost none in curtailing freedom of enterprise. (Cato, p. 286-7)

In The Supreme Court's Constitution, Mr. Siegan states that "the U.S. Constitution provides for and secures a capitalist economy. The existence of capitalism requires that private enterprise and private markets be legally safeguarded and allowed to function freely. Government intervention in the economy is permissible, but only when very special circumstances demand it."

(SCC, p. 106.) He advocates not judicial restraint but almost unbounded judicial activism when economic rights are at stake.

Mr. Siegan calls for a return to the era from 1890-1935 when the Supreme Court repeatedly overturned legislation protecting workers, consumers and children. Writing that "much welfare and regulatory regulation has proved economically harmful," he says "judicial review of such legislation serves the pragmatic interest of society." (EL&TC, p. 320) Indeed, Mr. Siegan extolls the opinions in Lochner v. New York, which overturned legislation limiting the number of hours of bakery workers, and Adkins v. Children's Hospital, which struck down minimum wage legislation. "Full rehabilitation may be in order for Lochner." Mr. Siegan asserts. (22 San Diego Law Review 454.)

Mr. Siegan's plea that federal judges uphold the rights of property owners derives not only from his passion for capitalism, but also from his contempt for and distrust of Congress and state legislators. In listing the reasons for a return to the bygone and discredited era of judicial supervision, Mr. Siegan states:

> In Washington, legislators decide issues concerning war and peace, economic well-being and recession, freedom and liberty; and legislators in cities and towns all over the country regulate the use of private property and the spending and taxing of the people's money.
> Yet rarely are these politicians expert or even very knowledgeable about these matters. On the contrary, they are expert only in that specialized part of political science involved in getting and remaining elected to office. ("Of Politicians And Pipes," Gazette Telegraph, Dec. 18, 1973)

He further criticizes legislators as follows:

> A strong case can be made that on many issues Congress and the state legislatures do not reflect the views of their constituents. ... These problems of legitimacy are compounded by problems of competency. Many legislators

> do not have the knowledge, understanding, incentive or time to create efficient and effective statutes. ... Even when legislatures do have the requisite qualifications, their effectiveness is limited by the need for compromise and for placating politically important constituents. (EL&TC, p. 321.)

Mr. Siegan concludes that the "limitations and infirmaties" he has reviewed "compromise the credibility of the legislature as the representative of the political majority and therefore its entitlement to final authority over legislation." (EL&TC, p. 320.) On this basis, Mr. Siegan argues for a more exacting level of scrutiny of economic legislation than the minimal standard of review now used. He would apply a three part test: "first, that the legislation serves important government objectives; second, that the restraint imposed by government is substantially related to achievement of those objectives ... and third, that a similar result cannot be achieved by a less drastic means." (EL&TC, p. 324.)

Thus, under Mr. Siegan's constitutional interpretation, a great deal of significant economic regulation would be overturned by the courts as invasions of property rights. He says, "the problem is that the cost and consequence of regulatory programs most of the time negates, overcomes, or overwhelms any derived benefits. Society will not therefore be any worse off in their absence." ("Occupational Licensing," Orange County Register, Oct. 23, 1977.) Indeed, says Mr. Siegan, government regulations "should be removed which interfere with the incentive to profit, including getting rid of bars to entry into business and restraints on production and hiring. The array of environmental,

consumer, labor and land use regulations has become so extensive and costly that many companies have given up the struggle for expansion and new construction." ("Helping Marginal Workers," Orange County Register, Sept. 18, 1977.)

Mr. Siegan shows a real animus towards environmentalists and environmental laws. In various columns, he opposes the ban on DDT, strip mining controls, land use planning, and the Clean Air Act. His opposition is based on the assertion that environmental protection is costly and is the refuge of a privileged class seeking to perpetuate their advantages at the expense of those who are less fortunate. Mr. Siegan calls the Clean Air Act "[p]robably the grossest example of a law passed on the basis of half truths." ("Costly Half Truths, Orange County Register, Feb. 29, 1976.)

Mr. Siegan similarly argues that worker health and safety laws are an unreasonable intrusion on business and impose unnecessary costs. "The justices should be vitally concerned about the time, money and discomfort OSHA inspections will cost Barlow's and other employers. They should direct their energies and talents to protecting individuals against the loss of freedom caused by OSHA." ("A Lost Mission?" Orange County Register, July 9, 1978)

It is enlightening to compare Mr. Siegan's opposition to the legislature in the economic regulation sphere with his position on the proper authority of the state legislatures in civil rights and liberties areas. When talking about integrating the schools, remedying sex and race discrimination, and regulating speech or

press, Mr. Siegan asserts that the courts should grant great deference to the legislatures. By contrast, in the case of economic regulation, the same legislatures suddenly become subject to pressures from special interest groups and incompetent to legislate reliably.

The Power of the Federal Government

Mr. Siegan's constitutional revisionism reaches back 170 years to the question presented in McCulloch v. Maryland of the scope of the Necessary and Proper Clause and the limits of implied federal power. In his book, The Supreme Court's Constitution, Mr. Siegan objects that Chief Justice Marshall's interpretation of the Constitution allowing for exercise of congressional power to further constitutional functions conflicts with that presented by Madison and Hamilton in the Federalist Papers of "a government whose powers are so few and so precisely defined that it lacks authority to curtail personal liberties and most state undertakings." (SCC, p. 11)

Mr. Siegan highlights the importance of the issue of national authority that is sufficient to meet the problems that led to replacing the Articles of Confederation with the Constitution by making the McCulloch case the subject of the first chapter of The Supreme Court's Constitution. His rejection of the historic McCulloch principle and its recognition of plenary federal authority in certain enumerated areas appears in articles as well. In "The Supreme Court: The Final Arbiter," Mr. Siegan states that "[i]n McCulloch v. Maryland Chief Justice

Marshall expanded on behalf of a unanimous court the meaning of the necessary and proper clause in a manner completely contrary to what the Federalists had represented in the ratification debates." (Cato, p. 280) Mr. Siegan complains that with "this one decision, the court eliminated a core understanding of the Constitution that held the Congress to be limited essentially to the powers enumerated in that document." (Cato, p. 281.)

McCulloch is the foundation of all later rulings empowering the national government to deal with a wide variety of social and economic problems. To reject McCulloch is to impugn the congressional power on which our Nation has developed as a federal system.

Conclusion

The nomination of Bernard Siegan to a seat on the Ninth Circuit presents the Senate with a clear question: should a person who rejects the foundations of the Constitution as it has been interpreted over the last 200 years be confirmed to lifetime tenure on the federal courts? The answer is an equally clear No.

Senator LEAHY. Additionally, the committee has just received letters in opposition to the nomination from the following officials: Mayor Tom Bradley of Los Angeles, CA; Mayor Terry Goddard of Phoenix, AZ; and Louise Renne, the city attorney for San Francisco in California. They will be put in the record.

[The letters of Mayor Bradley, Mayor Goddard and Ms. Renne follow:]

CITY HALL
LOS ANGELES, CALIFORNIA 90012
(213) 485-3311

OFFICE OF THE MAYOR

TOM BRADLEY
MAYOR

February 22, 1988

Honorable Patrick J. Leahy
Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

I am writing to oppose the nomination of Bernard Siegan to the United States Court of Appeals for the Ninth Circuit.

I do not find it easy to speak ill of another or to engage in public criticism of one who seeks to serve the public. I prefer the affirmative role -- to advocate a candidate I can support with enthusiasm. But in Mr. Siegan's case I have no choice. In my view, Bernard Siegan's extreme judicial philosophy and minimal legal experience do not qualify him to sit on the nation's largest federal appellate court.

I know that you are already familiar with many of Mr. Siegan's most bizarre legal theories. He argues that the Fourteenth Amendment permits school segregation and then halfheartedly defends the Brown v. Board of Education decision with a uniquely specious right to travel argument. Mr. Siegan opposes the Supreme Court's long line of decisions separating church and state; indeed, he concedes that his views on the Establishment Clause "would be laughed off the block" if ever handed down from the bench. And Mr. Siegan attacks the Supreme Court's decision to allow Congress to print paper money.

These views alone should be sufficient to doom Bernard Siegan's nomination to one of the nation's most influential appellate courts. But I am equally alarmed by Mr. Siegan's single-minded effort to give contract and property rights the extreme deference that they have not received since the Supreme Court rightly rejected the Lochner cases in 1937. If Mr. Siegan has his way, most local and state planning ordinances, zoning rules, building codes, and environmental laws (not to mention

minimum wage laws) would be struck down by the courts as unconstitutional "takings" of private property. In short, Mr. Siegan would nullify myriad decisions made by elected representatives to protect the public's health, welfare and safety. Even former Judge Robert Bork has noted that Mr. Siegan's judicial philosophy would result in "a massive shift away from democracy and toward judicial rule."

Mr. Siegan's inconoclastic views would wreak havoc on the efforts of cities within the Ninth Circuit -- such as Los Angeles and San Francisco -- to protect the environment and effectively manage growth. Many of these efforts, including requiring developers to mitigate the adverse impacts of additional construction, will necessarily impinge on absolute property rights. But such measures, duly enacted by the public's elected representatives, are essential to maintaining the qualify of life in our cities.

I realize that Mr. Siegan would represent only one vote on the Ninth Circuit Court of Appeals. But many key Ninth Circuit rulings have been decided by two-to-one margins. And almost all of these decisions are final; less than five percent of Ninth Circuit cases are ever reviewed by the Supreme Court.

I also know of Mr. Siegan's contention that as a judge he would ignore his own views and simply follow Supreme Court precedent. As you are well aware, life as a federal appeals court judge is seldom so simple. Mr. Siegan will be required to delve into the gray areas of the law, to interpret vague Supreme Court directions, and even to pass on novel legal theories. It is in these cases that Mr. Siegan's extremist views will threaten the environmental, worker and consumer protections that we all take for granted.

I strongly urge you to reject the nomination of Bernard Siegan to the United States Court of Appeals for the Ninth Circuit.

Sincerely,

Tom Bradley

TOM BRADLEY
Mayor

City and County of San Francisco: **Office of City Attorney**

Louise H. Renne,
City Attorney

February 24, 1988

The Honorable Joseph R. Biden, Jr.
Senate Judiciary Committee
224 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

Attn: Steven Metalitz

Dear Senator Biden:

I am writing to express my opposition to the nomination of Bernard Siegan to the U.S. court of Appeals for the Ninth Circuit. From Mr. Siegan's writings, it appears that he would be predisposed to view cases in a rigid and narrow framework -- just the opposite of what one looks for in a judge. The evidence suggests that Mr. Siegan would attempt to resolve the complex modern-day issues coming before him by seeking the original intent of the Framers of the Constitution and emphasizing the protection of "economic liberties" over individual rights.

For example, Mr. Siegan has criticized the Supreme Court's reasoning in the landmark case of Brown v. Board of Education. Mr. Siegan apparently disagrees that black children were denied any right to equal protection of the law. Astonishingly, he argues instead that their right to a desegregated education derives from the right to travel. Under this bizarre analysis, Mr. Siegan would effectively rob the Court of any role in enforcing desegregation.

In addition, if approved as a judge, Mr. Siegan is likely to attempt to impose his own extreme economic views. Mr. Siegan's writings suggest that he would undermine accepted zoning and planning legislation because it interferes with property rights as he views them. Mr. Siegan also opposes a wide variety of social and welfare legislation, including the minimum wage. What the committee has in Mr. Siegan is a radical judicial activist dressed in conservative clothing.

(415) 554-4283 Room 206 City Hall San Francisco 94102-4682

In deciding a case, a judge must be able to set aside his or her own personal ideology -- be it liberal or conservative -- and apply the law in a fair and even-handed manner. Given Mr. Siegan's writings and his economic agenda, it is difficult to believe that Mr. Siegan can bring this necessary fairness to his own decision-making process.

It is not enough to state, as Mr. Siegan does, that he should not be judged by his ideology because on the Ninth Circuit, he would be bound by Supreme Court precedent. On many issues arising in the Court of Appeal there is no dispositive Supreme Court decision. Indeed, decisions made by the Court of Appeal are often themselves precedential and never reach the Supreme Court.

The complicated social and economic issues facing the Court do not lend themselves to the simplistic economic formulas favored by Mr. Siegan. This approach has no place on the Court of Appeal. I therefore urge you to reject Mr. Siegan's nomination.

Sincerely,

Louise H. Renne
City Attorney
City and County of San Francisco

cc: Members of the Senate Judiciary Committee

1901G

CITY OF PHOENIX

Terry Goddard, Mayor

February 24, 1988

The Honorable Joseph R. Biden, Jr.
Chairman
Senate Committee on the Judiciary
Dirksen Senate Office Building, SD-224
Washington, D.C. 20510

Dear Senator Biden:

I write in opposition to the confirmation of Bernard M. Siegan to the United States Court of Appeals for the Ninth Circuit.

As Mayor of the ninth largest city in America, and as first vice-president of the National League of Cities, though without express discussion with the Governing Board Committee, I write to express my concerns from the standpoint of municipal law, specifically land use planning and zoning. These matters have in the past been a relatively minor part of the Ninth Circuit's work, but the tide of the law is changing and I think we may expect many more of these cases in the federal courts in the future.

I devote a significant amount of my efforts as Mayor to long-range land use planning and the designing and implementation of overlay zoning such as high density cores, historical or conservation districts. Such constructive land use policies help provide for orderly growth, accommodate transportation corridors and protect residential neighborhoods. The views of Professor Siegan on these topics are so hostile to the needs of modern cities that he would be a serious menace to municipal welfare and municipal progress.

I have deep respect for the broad discretion of the President in making judicial nominations and would not oppose an appointment unless I thought it was a serious threat to my community. This is the first time in over four years as Mayor I have addressed the qualifications of a judicial appointee, but in the case of Professor Siegan I believe a statement is necessary and request your committee reject this nomination.

Sincerely,

Terry Goddard
Mayor

TG/ee/lb/7275M

cc: Senator Dennis DeConcini

Municipal Building, 251 West Washington Street, Phoenix, Arizona 85003 • (602) 262-7111

Senator LEAHY. I would note that many of these letters and other materials have come to the committee from residents of the nine States making up the ninth circuit. For these millions of Americans, of course, appointments to the ninth circuit are particularly crucial.

The Ninth Circuit Court of Appeals decides more than 5,000 cases each year, and only a tiny handful of these decisions are ever reviewed by the Supreme Court. As a practical matter, the ninth circuit is the court of last resort for millions of Americans seeking justice under the Federal laws and the U.S. Constitution. The U.S. Senate, of course, is the last stop on the road for anyone who seeks a lifetime commission to sit in judgment on these vital cases and controversies.

That is why this committee has a paramount obligation to examine this nomination thoroughly, carefully, and, of course, fairly before it makes its decision. That has been the goal of the 20 previous nomination hearings we have held in this Congress and certainly it is the goal of this hearing as well.

As I have indicated, the only witness before the committee today will be the nominee. Professor Siegan was introduced to the committee at the first hearing by one of the senators from his State. We have received a request from the Secretary of Housing and Urban Development that he be allowed to make a second introduction. Of course, it is an extraordinary thing for a member of the President's Cabinet to come to a nomination hearing, and naturally, we accede to that request and are honored by the chance of having Secretary Pierce here.

So I will yield first to Senator Hatch for any opening statement he has, and then we would like to hear from you, Mr. Secretary.

Senator HATCH. Well, thank you, Mr. Chairman. I appreciate that.

Welcome to you, Professor Siegan. And Secretary Pierce, we are so happy to have you with us as well.

Today the Senate continues its evaluation of Prof. Bernard Siegan in conjunction with its constitutional authority to give advice and consent to judicial nominations. In the months past, we have all been reminded of the significance of the constitutional duty placed in the hands of the Senate. Quite frankly, however, I have become very concerned about the change of emphasis from judging the judicial nominee on the basis of merits and qualifications to judging judicial nominees on the basis of political ideology.

If it becomes commonplace to subject judicial nominees to a political litmus test, the judicial branch could end up as partisan and politically swayed as the legislative branch. That situation is not what is spelled out in our Constitution, and it is not what the Founding Fathers foresaw when they wisely created a non-political third branch to interpret the law.

Unfortunately, the way judicial nominations have been covered recently, both in the press and otherwise, it is leading us, I think, in a very sad direction. Partisan groups, I think, receive great attention in the press by criticizing or their criticism of nominees in blatantly political terms. Those charges in the press then dominate the Senate's work as well.

I hope that the Senate in its independent wisdom will resist the temptation to make judicial nominations just one more partisan battleground.

I have a few words to say about Professor Siegan. Professor Bernard Siegan is an outstanding nominee to fill the vacancy on the ninth circuit. His experience as an attorney in private practice, combined with his work as a distinguished professor of law at the University of San Diego Law School for the past 15 years, have given him both the practical and the academic knowledge and understanding of our laws.

He has spent most of his lifetime researching and studying the law as well as teaching it. Although Mr. Siegan has written on many constitutional issues, it is my impression that he is strongly committed to the principle of stare decisis. He accepts without question the premise that the lower court judges are bound by Supreme Court precedent.

One indication of Mr. Siegan's character and ability is the high esteem in which he is held by those who have worked with him for years. Mr. Siegan has the full support and confidence of his colleagues, those at the University of San Diego School of Law, and elsewhere. He is a distinguished academic professional and constitutional scholar who, I think, would be of great benefit to the Ninth Circuit Court of Appeals.

In conclusion, I would urge my colleagues on the Judiciary Committee to listen carefully to Professor Siegan's words rather than judging him on the basis of a few news articles. I hope that we will all do so in an honest, credible fashion.

Thank you, Mr. Chairman.

By the way, I would also place the statement of Senator Thurmond in the record at this point.

Senator LEAHY. Without objection, so ordered.

[The prepared statement of Senator Thurmond follows:]

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE COMMITTEE ON THE JUDICIARY, REFERENCE THE NOMINATION OF PROFESSOR BERNARD SIEGAN, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT COURT JUDGE FOR THE NINTH CIRCUIT. THURSDAY, FEBRUARY 25, 1988, 9:30 A.M., ROOM 226 DIRKSEN.

MR. CHAIRMAN, THE NOMINATION OF PROFESSOR SIEGAN HAS BEEN BEFORE THE JUDICIARY COMMITTEE SINCE FEBRUARY 2, 1987; OVER ONE YEAR. PROFESSOR SIEGAN APPEARED BEFORE THE COMMITTEE ON NOVEMBER 5, 1987, AND RESPONDED TO QUESTIONING FROM MEMBERS OF THE COMMITTEE WHO WERE PRESENT. DURING THE HEARING HIS RESPONSES WHERE HONEST, SINCERE AND FORTHRIGHT, AND NOTHING HE SAID THAT DAY DEMONSTRATED TO ME THAT HE SHOULD NOT BE CONFIRMED AS A UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT.

THERE ARE SOME WHO HAVE EXPRESSED CONCERNS REGARDING PROFESSOR SIEGAN'S JUDICIAL PHILOSOPHY, AND IN PARTICULAR HIS PUBLISHED WRITINGS WHERE HE HAS BEEN CRITICAL OF SOME OF THE SUPREME COURT'S DECISIONS. AS I HAVE STATED PREVIOUSLY, I DO NOT FEEL THAT A NOMINEE'S JUDICIAL PHILOSOPHY SHOULD BE THE SINGLE CRITERIA USED IN EVALUATING AN INDIVIDUALS FITNESS FOR THE BENCH. THE COMMITTEE HAS HAD AMPLE TIME TO MAKE A COMPLETE AND THOROUGH INVESTIGATION OF PROFESSOR SIEGAN AND THERE IS ABSOLUTELY NOTHING WHICH HAS BEEN DISCLOSED ABOUT HIS CHARACTER, EXPERIENCE OR BACKGROUND THAT WOULD PREVENT HIS CONFIRMATION.

PROFESSOR SIEGAN, IN MY OPINION, HAS ALL OF THE QUALIFICATIONS NECESSARY FOR THE POSITION TO WHICH HE HAS BEEN

NOMINATED. HE RECEIVED HIS JURIS DOCTORATE DEGREE FROM THE UNIVERSITY OF CHICAGO LAW SCHOOL IN 1949. FROM 1949-1973 PROFESSOR SIEGAN WAS IN THE PRIVATE PRACTICE OF LAW IN CHICAGO, ILLINOIS. SINCE 1973 HE HAS BEEN A PROFESSOR OF LAW AT THE UNIVERSITY OF SAN DIEGO LAW SCHOOL. DURING THIS PERIOD HE HAS HELD A NUMBER OF IMPORTANT POSITIONS WITH THE FEDERAL GOVERNMENT, FOR EXAMPLE, FROM 1973-1976 PROFESSOR SIEGAN WAS CONSULTANT TO THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; FORM 1981-1982 HE SERVED AS A COMMISSIONER ON THE PRESIDENT'S COMMISSION ON HOUSING; FROM 1985-1986 HE WAS A CONSULTANT TO THE FEDERAL TRADE COMMISSION, BUREAU OF COMPETITION, AND SINCE JULY 1985, PROFESSOR SIEGAN HAS SERVED WITH ABILITY AS A COMMISSIONER ON THE COMMISSION ON THE BICENTENNIAL OF THE U.S. CONSTITUTION.

PROFESSOR SIEGAN'S NOMINATION WAS INVESTIGATED BY THE ABA'S STANDING COMMITTEE ON THE FEDERAL JUDICIARY. THE ABA FOUND HIM TO BE "QUALIFIED" TO SERVE AS A UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT. PROFESSOR SIEGAN HAS HAD AN IMPRESSIVE CAREER AS A PRACTICING ATTORNEY, LAW SCHOOL PROFESSOR AND SCHOLAR. HE IS AN INDIVIDUAL WHO POSSESSES THE INTEGRITY, PROFESSIONAL COMPETENCE AND JUDICIAL TEMPERAMENT TO PERFORM THE DUTIES OF A CIRCUIT COURT JUDGE.

I HOPE THAT IT IS THE CHAIRMAN'S INTENTION TO PLACE PROFESSOR SIEGAN'S NAME ON THE BUSINESS AGENDA SCHEDULED FOR MARCH 1, 1988. HE DESERVES A VOTE BY THIS COMMITTEE, AND TO DELAY THE NOMINATION ANY FURTHER SERVES NO WORTHWHILE PURPOSE.

Senator LEAHY. Mr. Secretary.

STATEMENT OF HON. SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT

Secretary PIERCE. Thank you very much, Mr. Chairman, members of the committee. It is my pleasure to be here this morning to introduce the further testimony of Professor Bernard H. Siegan in connection with his nomination by the President to the U.S. Court of Appeals for the Ninth Circuit. This nomination has been pending for close to a year. And while I appreciate the demands on this committee and the serious nature of the task to be performed, I would urge in the strongest terms this committee's swift and favorable recommendation of Bernard Siegan.

I came to know Professor Siegan through his exemplary work as chairman of the Regulations Committee of the President's Commission on Housing during 1981 and 1982. Bernard Siegan was selected for this important post not only because of his ample achievements as a legal academic, but also because of his long-standing concern with legal and economic policies which can sometimes stand as road blocks to the delivery of affordable housing to low- and moderate-income families. This, as you know, has been a personal concern of mine as well. For example, our research and experience at the Department of Housing and Urban Development, in our Joint Venture for Affordable Housing, demonstrates that regulation which does not substantially advance the health and safety of the community all too often blocks the entry of less affluent families, which include minorities, to desirable communities and decent housing.

Now, I have been given to understand that some people claim Professor Siegan's views are "out of the mainstream." I am never exactly sure what that type of statement means, because the allegation seems to depend more on the subjective views of the speaker than anything else.

Nevertheless, it is clear that the American Bar Association, which unanimously found Professor Siegan qualified for this judicial post, disputes that characterization. So do the glowing evaluations of hundreds of students and capable faculty at the University of San Diego Law School where Bernie has held the highest faculty position, the Distinguished Professorship, for almost 15 years.

"Out of the mainstream"? Well, maybe, if someone who recognizes the indissoluble link between civil and economic rights can be so described. "Out of the mainstream"? Perhaps, if that is a fair characterization for someone who cares deeply in a very practical way about creating housing and other economic opportunities for American families with moderate means.

All too often, Mr. Chairman, low- and moderate-income families are still predominantly minority families. One has to question, if we are being honest, whether costly regulation is truly a means to promote safety, or merely a means to erect a formidable "keep out" sign in front of those who some people would rather not have as neighbors.

Bernard Siegan has not been afraid to be honest, and he is not out of the mainstream of people who share the qualities of integri-

ty and candor. Moreover, the fundamental core of his analytical approach has been recognized by the Supreme Court. For example, a few years back, Justice Stewart noted that "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. . . . That rights in property are basic civil rights has long been recognized."

Several years before this was written, Bernard Siegan had already published a ground-breaking article to the same effect in the Journal of Law & Economics. That article found that the absence of some land-use regulations in Houston resulted in lower rents and a greater number and variety of apartments. He carried that work forward into other research and to his work on the President's Commission on Housing. Under his leadership, the Commission recommended that the housing regulation be limited by State legislatures and reviewing courts to that which can be shown to advance "vital and pressing governmental interests." These are not the views of someone out of step with the legal community working with an axe; rather, they were the views of a highly competent and skilled lawyer who, with a scalpel in hand, was carefully adjusting and balancing the legitimate concerns of local communities with the housing needs of the American citizen.

When Bernard Siegan chaired the Regulations Committee of the Housing Commission in 1981 and 1982, the housing picture was especially bleak. High inflation and intolerable interest rates were responsible for excluding millions of hard-working Americans from the housing market. No matter how hard they worked, these families never quite had enough to buy into the American dream. That is why it was so important to have the clear thinking of a Bernard Siegan address the problem of unnecessary regulatory costs on housing.

As the results came in from our Joint Venture for Affordable Housing, we came to understand even more tangibly Bernie's message. Our studies found that housing units could be delivered at a 20 to 30 percent lower cost by eliminating overly large lot sizes and various restrictions on perfectly acceptable building materials. In essence, our empirical work verified Bernie's legal analysis.

Perhaps influenced by Siegan's work, the Supreme Court just this last summer emphasized the importance of having the proponents of land use regulation demonstrate that such regulation substantially advances legitimate governmental interests. The similarity between the court's reasoning and Professor Siegan's prescription of years earlier is truly remarkable. So, too, Professor Siegan has had high praise for Justice William Brennan's position on the need to honor the fifth amendment and provide compensation to landowners adversely affected by over-regulation. This is a position Professor Siegan has traced to Oliver Wendell Holmes, and a position which the Court overwhelmingly adopted last year in its landmark decision in *First English Evangelical Lutheran Church* v. *Glendale.*

Now, to be sure, as an academic, Professor Siegan has taken issue from time to time with various Supreme Court decisions. This is what law teachers are supposed to do. I know: I myself am a former law professor. With his first-rate, inquiring mind, Siegan has asked some very important questions. As Professor Philip Kurland of the University of Chicago Law School has written: "Siegan, like Locke and some more modern writers, realizes that control of property and its disposition may be a basic liberty without which no other can survive or be meaningful. His work is both revealing and provocative in expounding a theory of constitutional construction."

Professor Siegan understands, of course, the fundamental difference between academic lawyer and appellate judge. The former is to prod, to question and to challenge legal opinion from whatever quarter—to be, in Professor Kurland's words, "revealing and provocative." The function of the appellate judge is quite different, anchored as it is to the observance of the rule of law as provided in the Constitution and construed by the Supreme Court. Professor Siegan's previous testimony before this body amply illustrates his true appreciation for the proper role of a judge. More importantly, his even-handed temperament, his patient and gentle nature, and his sincere compassion for the welfare of those less fortunate convinces me that, upon confirmation, he will uphold justice.

Members of the committee, thank you very much for allowing me the opportunity to provide this introduction for Professor Siegan.

Senator LEAHY. Thank you very much, Mr. Secretary. As I said at the outset, I think it is extraordinary when a member of the Cabinet will come to speak in favor of a judicial nominee. And we have to give heavy weight to that, and I do.

I also, though, look at the fact that you are an experienced litigator. You have had a lot of experience, especially in the Federal courts, and so I would like to ask you a couple of questions. If you were wearing your litigator's hat just for a moment, let us imagine that you are about to argue a case before the Federal court of appeals. And I can think of some of the questions that went through my mind whenever I had to argue cases before the Federal court of appeals.

Let us suppose that you have got a pretty complex case, and it is going to turn on the trial judge's ruling on a rather arcane point of civil procedure. Now, that is not an unusual case to come before the court of appeals. I have been involved in litigation like that; I am sure you have. Just about everybody who goes before the court of appeals has.

Now, let us suppose you look at the three judges who are going to be on that panel. You find that one of them has never been a judge of any court before going on the court of appeals bench. Secondly, that judge has never argued a case before any Federal court of appeals; that judge has never had any involvement in Federal appellate litigation at all. In fact, you find that he has not appeared in any Federal court on any matter, trial, appeal, motion, for at least 35 years, from the time when I was 12 years old.

Now, as a lawyer, if you were representing a party in a complex piece of Federal litigation, would you feel comfortable having that judge hear your appeal?

Secretary PIERCE. There were three judges, you say?

Senator LEAHY. Yes.

Secretary PIERCE. Who was the third judge?

Senator LEAHY. I have just explained the third judge. One of those three judges has that background, a background of not having been in any Federal court on any matter, since I was 12 years old, 35 years ago; has never argued a case before any Federal court of appeals; has never had any involvement in Federal appellate litigation; never been a judge of any court before going on the court of appeals.

Would you be nervous?

Secretary PIERCE. Well, I do not think I would be any more nervous than ordinary. I guess any time you argue a case you are a bit nervous. You want to win. But I believe that if a person has sound judgment and has a good mind and has academic acumen, that person will do the right thing. Especially if that judge has two veterans with him who have a great deal of trial knowledge and know-how.

Senator LEAHY. But he is going to be independent. He cannot have the other two judges tell him how to vote.

Secretary PIERCE. No. That is true. But you do gain knowledge and understanding from your colleagues. There is no question about that.

Senator LEAHY. Well, suppose this was his first case, his first day on the bench. You would not be nervous about that? You would not be more nervous than you would be if you had an experienced judge there?

Secretary PIERCE. Well, that is very hard. It is hard to say. You would have to know the type of case you are arguing; you would have to know what there is to be nervous about; what is the issue, precisely?

Senator LEAHY. Mr. Secretary——

Secretary PIERCE. Why would it matter?

Senator LEAHY. You mean you do not think it matters if you have somebody who goes on to hear a case in a Federal court of appeals who has had no experience, has not been in a Federal court for 35 years, has never argued cases there, has had no experience whatsoever. You do not think that matters?

Senator HATCH. Well, if he has been a law professor for 15 years, it seems to me that——

Senator LEAHY. Well, why do we not let the Secretary answer. It is such a novel appearance having him here at a hearing, I want to hear him answer.

Secretary PIERCE. Well, I tell you, I would think, as I said, you have two other experienced judges on the court, and I think that you have someone who does have a great legal background. I believe that he would do the right thing because he has the training and understanding to do it.

Senator LEAHY. Let us take a couple of particular cases. You were involved as a lawyer in one of the landmark first amendment cases in recent decades, *New York Times* v. *Sullivan*. Just for the

record, that was a case that involved a libel suit brought by the police commissioner of Montgomery, Alabama, over an advertisement concerning the civil rights movement. You represented a number of people in that case, did you not, Mr. Secretary?

Secretary PIERCE. Yes, I did.

Senator LEAHY. Who were those people?

Secretary PIERCE. They were the ministers that were involved.

Senator LEAHY. They signed the ad?

Secretary PIERCE. There were a number of ministers involved, and then there was the New York Times itself. The New York Times was represented by its corporate counsel; I believe it was Lord, Day and Lord, and I think they got outside counsel to represent them in that particular argument. Then Bill Rogers and I represented the ministers because we were asked to do so by Martin Luther King.

Senator LEAHY. Among the ministers you represented was Martin Luther King, Sr., was it not?

Secretary PIERCE. No. I do not believe he was involved. I do not think he was. He may have been, but I do not believe so. But there were other ministers represented by Bill Rogers and myself.

Senator LEAHY. One of the extraordinary things about that case, the Supreme Court actually put in the appendix of its decision the ad itself, which shows one of the ministers was Reverend Martin Luther King, Sr. Not that that makes any difference on the principle of it.

In the *Sullivan* case the Supreme Court established the first amendment principle that a negligently false statement made in the heat of political debate cannot be grounds for a libel suit. They said that a public official claiming libel has to show the libel was published with actual malice.

Now, would you agree that was a landmark decision on free speech?

Secretary PIERCE. Yes, it was.

Senator LEAHY. Was it a landmark decision as a practical reason for the success of the civil rights movement in the South?

Secretary PIERCE. I think it helped the civil rights movement, yes.

Senator LEAHY. It certainly would have hurt it had it gone the other way?

Secretary PIERCE. Yes, I think so.

Senator LEAHY. You are being modest. I think you have every right to be proud of your involvement in that case. I think it was a significant one.

Now, Professor Siegan has been quite critical of the unanimous Supreme Court decision in this case. Did you get a chance to read his chapter on the first amendment and libel in his new book, *The Supreme Court's Constitution*?

Secretary PIERCE. No, I did not.

Senator LEAHY. Well, he says basically that the Supreme Court was wrong when it rejected [illegible] argument that this advertisement was simply commercial speec[illegible]ather than speech about public issues that go to the heart of the first amendment.

In other words, he appears to believe that this advertisement, which was captioned "Heed their rising voices," was entitled to

about the same degree of first amendment protection as an advertisement for toothpaste might receive.

Now, let me read you what Professor Siegan said in his book, his new book: "The *Sullivan* facts did not by themselves present a pressing need for legal change. The case involved a paid commercial advertisement soliciting funds for a civil rights cause." He then discusses the case in which the court denied first amendment protection for deceptive advertising.

He then summarizes: "The high court has accepted this distinction which seems just as applicable to political advertising. In *Sullivan*, neither the newspaper nor advertiser was under time constraints. The ad would have been no less effective had it been delayed to assure accuracy. Safeguarding the falsehoods it contained was scarcely essential in order to protect speech that matters." So he read the unanimous decision on the *Sullivan* case, and apparently concluded it was a mistake.

Now, you have read the case. In fact, you are in the case. You helped to establish the principle. Do you agree that this advertisement really should have been treated the same as an advertisement for toothpaste as far as the first amendment is concerned?

Secretary PIERCE. It is obvious that we would differ, but that is the law. There are many differing opinions in the law, and each year, if you read many Supreme Court decisions, you may admire judges on both sides of the fence. You will find that judges and lawyers differ in the law. It is one of the things about our legal system. I think it is wonderful. But Professor Siegan and I would differ there.

But the big thing and the important thing here is, as I read the testimony of Professor Siegan when he was before this committee last time, he said that, as a judge of the court of appeals, he would follow the Supreme Court. In that article, he was writing as an academic lawyer who can posture and have ideas and think and do all kinds of things to try to get people to think in certain ways.

But when he becomes a member of the appeals court, he said he would follow the Supreme Court. That is what is very important, I think.

Senator LEAHY. Mr. Secretary, does that not really only go to part of the question? Because every court of appeals judge has to do that. They are sworn to do it. They do not really have a choice, unlike the U.S. Supreme Court which can change precedent. But the practical matter is this: Every nominee who comes before us for confirmation to the court of appeals says it, almost as a ritual: "I will follow the precedents of the Supreme Court." But as a practical matter, in a large percentage of the cases that come before the courts of appeals, there really is no precedent, certainly no precedent on all fours from the Supreme Court. So there is a great deal of latitude for the members of the court of appeals to go wherever they want.

Certainly, that has been my experience in arguing before them. It has been your experience in arguing before them. Many, many times there is no decision of the Supreme Court that is directly applicable. If there was, you probably would not have had the matter there on appeal anyway. Often you have got a case of first impres-

sion, or you have got a case that can go either way on interpretation of procedural matters.

Is that not a fact?

Secretary PIERCE. Well, I have no disagreement with that.

Senator LEAHY. I mean, it is not a case where any time a case comes up before the court of appeals, the judges can just say whatever the Supreme Court said on this. Precedent is one of the things they look at, but often they cannot find the answer there.

Secretary PIERCE. That is true. But in examining anybody who is going to go on a court of appeals, you cannot possibly tell through your examination of them in this committee all the views that he or she would take every situation that will face him in the future.

Senator LEAHY. I agree.

Secretary PIERCE. And I think a person has to be trained to be a judge in the sense of having the legal background and talent to do it, which I do believe Professor Siegan has.

And I also think that his personality is right; the makeup of the man is right for the job, in my view.

Senator LEAHY. I absolutely agree with you that we cannot go into every question of how they're going to rule. And I would hope that that day would never come that we could. That is not the way to proceed here.

But when you speak also of the makeup of the person, that is an issue that we have to look at. If you have somebody who has not been in the Federal courts for 35 years, who has had no experience in this area, nominated to go into a very complex court, and to deal in very complex fields of law, I think it is appropriate to look at that.

It is appropriate to look at Professor Siegan's background. But it is also, would you not agree, appropriate to look at the question, or raise the question—each Senator will have to answer it for himself on this committee, or himself or herself in the full Senate—but do you not agree that it's appropriate for us to ask whether that total lack of experience in the Federal court system is a question to be considered in this nomination?

Secretary PIERCE. I think you have to take the situation as a whole. You must look at the whole background of the individual, his training, his experience, his academic experience, altogether, to see whether you truly believe he can handle this job.

Senator LEAHY. I understand. I think each Senator has to do that. But part of that equation is this lack of Federal court experience, is it not, along with the academic background and the writings and the obviously demonstrated and acknowledged intelligence of the nominee.

Would you not agree that all of those are items to look at?

Secretary PIERCE. Everything is an item to look at and put in balance. Apparently it was looked at by the American Bar Association. And on balance they unanimously agreed that he should be a judge.

Senator LEAHY. No, the President agreed he should be a judge by sending the appointment. The American Bar Association gave an evaluation of "qualified."

Secretary PIERCE. That's agreement; unanimously qualified. Saying that he should be judge.

Senator LEAHY. Which is the lowest——

Secretary PIERCE. There is only—either you are not qualified, you are qualified, or you are well qualified. There are only three.

Senator LEAHY. Or you are exceptionally well qualified.

Secretary PIERCE. And the vast majority of people never get well qualified, particularly on their first attempt to become a judge. And many of them are disapproved. They are not even rated as qualified.

And I dare say, if I traced the history of this committee, I will find a number of judges who were selected who were not voted as qualified by the Bar Association.

Senator LEAHY. Senator Hatch?

Senator HATCH. Well, thank you, Mr. Chairman.

I do not want to keep you very much longer, Mr. Secretary, because I know you have to go. But I just want to point out that I suppose it is fair to ask about any aspect of qualification with regard to any judgeship nominee.

But you point out very accurately that the American Bar Association unanimously has found Bernard Siegan qualified.

And sometimes that is not easy for them to do. And I have been just as critical about them as anybody else. But when that happens, and especially during this administration, that is a good thing.

I might mention that Judges Posner, Winter, Silberman, Scalia, all appellate court judges, except for Scalia now who is a Supreme Court justice, all of them were academics.

Would you have felt any reticence or difficulty appearing before any of them as brand new judges?

Secretary PIERCE. No.

Senator HATCH. Not at all. As a matter of fact Felix Frankfurter was an academic before he went on the U.S. Supreme Court. And Justice Douglas was primarily an academic, although he did have experience with the SEC, but certainly not much trial practice.

And yet they became two of the greatest justices of the Supreme Court. You would not have had any difficulty with that, would you?

Senator HATCH. No, neither would I.

Justice Black happened to have been a Senator. One of the all time greatest justices on the Supreme Court.

Most of these people were primarily academicians before taking the bench. And frankly, you know, some people think, and I know my senior colleague from Utah, believes it might be good to have some nonlawyers on the Supreme Court.

Because you don't have to be a lawyer on the Supreme Court. Because he thinks there ought to be some more practical wisdom there. He may be right.

I do not think that lawyers control everything, or have every idea, or can do the job better; trial lawyers in particular.

For instance, there are lots of people who are afraid to appear before some very experienced trial lawyers who became judges, because they are people who have shown evidence since they came on the bench that their prior trial experience, whether as a plaintiff's lawyer or defense lawyer or combination, seems to color what they do on the bench.

You can find all kinds of illustrations. The point is that a person should not be rejected merely because he or she may lack some aspect of training.

In this case, I don't think Professor Siegan lacks any of that.

I might mention that President Carter nominated Dorothy Nelson to the Ninth Circuit Court of Appeals without any trial experience whatsoever.

She got a minority, not qualified rating from the ABA, but she was unanimously approved by this committee. I was one of those who was part of that unanimous approval, even though I knew that she didn't have any real trial experience.

Keep in mind, the Ninth Circuit Court of Appeals is that particular circuit that the Wall Street Journal wrote was reversed 27 out of 27 times one year, as I recall. And if I recall correctly, one of the judges out there indicated that they didn't care if the Supreme Court reversed them every time.

They tried hundreds of cases that would never come before the Supreme Court. And they will write them any way they want to.

And that certainly is not what Professor Siegan stands for. He says he will abide by precedent and do what is right.

So all of these things are important. And I suppose we can bring them up time and time again. But the real issue here is the qualifications of this nominee, and in this particular case, the ABA has judged him qualified.

And I think had he had more trial experience, they probably would have adjudged him very well qualified, which would be a higher qualification.

But that generally only comes to those who have had a broad background in everything. And it is not a sin to be listed as qualified by the ABA. As a matter of fact, it is quite an accomplishment for anybody when you consider the minority not qualifieds that really we have to see from time to time before this committee.

Thank you, Mr. Chairman.

Senator LEAHY. I understand that the Republicans have objected on the Floor of the Senate, as they have a perfect right to do under the Senate rules, to any committees meeting, I have just been told.

Senator HATCH. The Republicans have?

Senator LEAHY. Yes.

Senator HATCH. Are you sure of that?

Senator LEAHY. Well, that is what I have been told. And I understand that Senator Thurmond has been trying to talk to his fellow Republicans to lift that ban.

We will take a 5-minute recess while I call the parliamentarian to determine whether, under the Senate rules, this hearing may proceed. And Secretary Pierce, I know you have to go.

Do either of the other two Senators wish to question Secretary Pierce? He is in a hurry to get to New York.

Senator HEFLIN. They are always in a hurry. I have never found an executive yet that was not in a hurry. They do not want to be questioned too much.

Senator LEAHY. It is such a welcome change, having the Secretary up here on Capitol Hill, after all these years, that we kind of hate to let him go. And we ought to have the Sergeant at Arms block the door. But I do not think that would be fair to him.

And insofar as we may not be allowed to meet anyway, unless the other two Senators have questions of Secretary Pierce, I think to accommodate his schedule, we will let him go.

Senator HEFLIN. I am willing to accommodate him.

Senator LEAHY. The Secretary has been very good to be here, and he accommodated my bout with the flu this morning which made us late starting.

Thank you very much, Mr. Secretary. And we will stand in recess for 5 minutes while we find out whether the filibustering hordes will allow justice to go forward and hear Professor Siegan.

I am going to fight with the members of your party to allow this hearing to go forward, Professor Siegan. I want you to know we are with you all the way on that.

Mr. SIEGAN. I know you will do the right thing, Mr. Secretary.

Senator LEAHY. Thank you, Mr. Secretary.

Senator HATCH. If I could just say one thing, Mr. Secretary, at least you do not have to worry about being arrested up here. Your civil liberties will be protected.

[Brief recess.]

Senator HATCH. Can we have order in this room?

Now, Mr. Chairman, as I understand it, somebody did launch a blanket objection to committees meeting because of some irritation with another committee, not this one.

It is my understanding the distinguished minority floor leader has come on the floor and has notified your side that he has exempted this particular and this committee.

And it is also my understanding that you have been notified informally by your side that that is true. So why do we not just proceed and get this over with.

Senator LEAHY. First of all, let us have it accurately. There has not been a blanket objection in the sense that no committees have been exempted. A number of committees have, by the Republican leadership, been exempted so they could have hearings today.

Senator HATCH. All right. This is one of them.

Senator LEAHY. The Judiciary Committee has not, as yet, been exempted. Now I am perfectly willing—and I have checked with the majority leader to make sure that no Democrats were objecting to this hearing, because if there were, I would immediately ask them not to object——

Senator HATCH. And no Republicans are objecting.

Senator LEAHY [continuing]. So we could go forward. But the Republicans have objected. And I understand when the Senate goes back into session—we are in a quorum call now—that the distinguished acting Republican leader, Senator Simpson, has said that he would not object to the Judiciary Committee meeting.

Alan Simpson's word is good enough for me under any circumstance, on any matter. Now, technically, however, we still cannot meet at this time, because the Senate is in a quorum call. I will, if there is no objection, and realizing any Senator could object to us continuing, I will take the extraordinary procedure of bending the Senate rules and going forward with this hearing to accommodate the administration and the Republican Party, so I will not have one more complaint, given of course carefully and off the record from the Department of Justice, that we are delaying Mr. Siegan.

Because I am sure they would forget to add the other part, that the delay was caused by the Republicans 'objection.

Now, all of us having made our points, Professor Siegan, you see, these are the kinds of issues involved when we ask you how carefully you will uphold the law. We will now go forward with this committee hearing which is technically meeting in violation of the rules.

Go ahead, sir.

Senator HATCH. Well, no, they've lifted—we've been formally notified.

Senator LEAHY. It has not been lifted. Let's just be precise on this.

Senator HATCH. Duke, has it been lifted or hasn't it?

Mr. SHORT. Yes, sir, it has been.

Senator HATCH. Then let's go, and let's quit playing games on it.

Senator LEAHY. We're still in our quorum call. But let's go ahead.

Senator HEFLIN. Are there any pains or penalties or chances of being arrested?

Senator LEAHY. No, I have been assured that the Sergeant at Arms has agreed that he will not come here and bodily carry Senator Heflin out of this room.

TESTIMONY OF BERNARD H. SIEGAN, LA JOLLA, CA, TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. SIEGAN. I have no statement. I have no opening statement, if that is your inquiry, Mr. Chairman.

I am delighted to be here. I am delighted to watch the Senate in operation. [Laughter.]

Senator LEAHY. Believe me, that is not a delight shared by any one of the 100 Senators these days. But you have already been sworn in. And any time if you would care to take a break, just let us know.

But let me go into some questions. At your prior hearing Senator DeConcini asked you a number of questions about your experience as a lawyer in Federal court.

Senator HATCH. Can I ask, Mr. Chairman, what the procedures are? Are we going to go by a 10-minute rule? Or what is your pleasure?

Senator LEAHY. Why don't we just accommodate everybody and make it work out?

So if I could flesh that area out a bit, have you ever argued a case in the Ninth Circuit Court of Appeals, the court to which you have been nominated?

Mr. SIEGAN. Never.

Senator LEAHY. Have you worked in any way on any case before the ninth circuit by, say, writing a brief for example?

Mr. SIEGAN. I probably participated in one brief, a ninth circuit brief, on the *Petaluma* case.

Senator LEAHY. On which case, sir?

Mr. SIEGAN. *Petaluma* case, I don't recall the exact title. It was involved with a growth limitation in Petaluma. But that is the only one that I worked on.

There was a brief filed, I think it was an amicus brief. It goes back many years.

Senator LEAHY. Could you see if you could find the citation and give it to us, please?

Mr. SIEGAN. Yes, be happy to.

[The following material was subsequently supplied for the record:]

I helped prepare an amicus brief filed by the Pacific Legal Foundation in *Construction Industry Association of Sonoma County* v. *City of Petaluma*, 522 F.2d 897 (9th Cir. 1975) reversing 375 F. Supp. 574 (N.D. Cal. 1974).

Senator LEAHY. Are you admitted to practice before the Ninth Circuit Court of Appeals?

Mr. SIEGAN. No, I am not, sir.

Senator LEAHY. You are not admitted to the court that you are being appointed to?

Mr. SIEGAN. No.

Senator LEAHY. What about the Federal district courts within the ninth circuit? There are 15 of those courts. Have you ever tried a case in any of those?

Mr. SIEGAN. No, I have not. I have not practiced law in California since I have come to California.

Senator LEAHY. And you are not admitted to any of those courts?

Mr. SIEGAN. No, I am not.

Senator LEAHY. Have you ever been involved in any case before any of these 15 district courts whose decisions you would be reviewing if you are confirmed?

Mr. SIEGAN. No.

Senator LEAHY. And you are not admitted to practice before any of those district courts?

Mr. SIEGAN. That's correct.

Senator LEAHY. Now, as I understand it, in the early 1950s, you had some experience in Federal court handling motions and bankruptcy matters; is that correct?

Mr. SIEGAN. Yes, that's correct, Mr. Chairman.

Senator LEAHY. And Professor, have you ever tried a case in a U.S. district court anywhere in the country?

Mr. SIEGAN. No, I have not.

Senator LEAHY. Have you ever argued an appeal in any Federal appeals court anywhere in the country?

Mr. SIEGAN. No, I have not.

Senator LEAHY. Now, in our questionnaire, where we talk about your litigation experience in other courts, in the question there the committee asked you to list the 10 most significant litigation matters which you have personally handled.

And in the prior hearing on your nomination, Senator DeConcini probed the details of your involvement in some of these cases. So if I could just sum them up, and please feel free to disagree with my characterization at any point.

All of these cases involved real estate development; is that correct?

Mr. SIEGAN. Not development. I think one was a contract case.

Senator LEAHY. Did that involve real estate, though?

Mr. SIEGAN. It involved real estate, but not real estate development. It was a question of a contract that had been violated by one of the parties. I represented a person who sought to enforce that contract.

Senator LEAHY. Now, the most recent of these cases took place in 1966; is that correct?

Mr. SIEGAN. I believe so. I indicate in the list the dates, and I assume that is correct.

Senator LEAHY. And all these cases were heard in State court, is that correct?

Mr. SIEGAN. Yes, sir.

Senator LEAHY. Is it true that only one of the cases involved an actual trial with witnesses and direct and cross-examination and an appeal decided on the merits?

Mr. SIEGAN. I think perhaps two. In one instance there was a summary judgment. There was a hearing and argument on whether a summary judgment should be granted.

There was some argument in another case prior to the case being settled.

Senator LEAHY. You list in your case questionnaire number six, the annexation dispute.

Mr. SIEGAN. What page is that, sir?

Senator LEAHY. Page 18 in the committee's questionnaire. And it's case number six, it's the annexation dispute between Palatine and Rolling Meadows. That was an actual trial, was it not?

Mr. SIEGAN. Yes. It was largely an argument before the judge that was sitting in that case.

Senator LEAHY. In that case, your own client wasn't a party?

Mr. SIEGAN. No, it was between two municipalities.

Senator LEAHY. You did not personally examine or cross-examine a witness at the trial?

Mr. SIEGAN. No, I did not.

Senator LEAHY. Or personally argue the appeal?

Mr. SIEGAN. No, I did not.

Senator LEAHY. On your 10 cases which you have listed as your most significant, you are not saying that those demonstrate that you have had trial or appellate experience in contested cases, are you?

Mr. SIEGAN. Well, obviously, I have limited trial and appellate experience. I think I readily acknowledge that. There's no question about that.

Senator LEAHY. Now, you mentioned in your questionnaire that your firm handled other kinds of cases, tort claims, suits, landlord-tenant proceedings, and so on.

Did any of these cases involve trials or appeals on the merit?

Mr. SIEGAN. Possibly some of them. There may have been some trial work in two divorce cases I handled. This goes back many years.

Senator LEAHY. I understand.

Mr. SIEGAN. And we had, while we largely specialized in real estate law, we did take the general kind of run-of-the-mill cases that come to a lawyer's office.

And it is very possible that in those cases I may have gone to court for one reason or another. There was nothing major that I can describe to you that occurred in any of the other cases.

Senator LEAHY. You never handled any criminal law cases, did you?

Mr. SIEGAN. I may have one, but that is about it.

Senator LEAHY. Generally, not that it really sticks in your mind?

Mr. SIEGAN. No.

Senator LEAHY. The reason I ask is that criminal law cases make up a very substantial portion of the docket of the ninth circuit.

Have you done scholarly writing or academic writing in the criminal law area?

Mr. SIEGAN. No, I have not.

Senator LEAHY. We just went through Judge Kennedy's nomination, and in preparing for those hearings, I noticed the very large number, first, of criminal cases he heard in the ninth circuit, and then also of immigration cases; in fact, there were a very significant number of immigration cases.

Have you ever handled cases in the immigration area?

Mr. SIEGAN. No, I have not.

Senator LEAHY. Have you done any scholarly writing in the immigration area?

Mr. SIEGAN. No, I have not.

Senator LEAHY. Have you ever done anything in tax litigation?

Mr. SIEGAN. No.

Senator LEAHY. Have you done any scholarly writing in the tax area?

Mr. SIEGAN. No.

Senator LEAHY. Now, not all of the courts of appeal judges come from litigation backgrounds, although most of them have been deeply involved in the courtroom at some point in their careers.

Some of course have academic credentials as you do. Others have been state legislators, members of Congress, whatever; all of this can be valuable preparation.

Is there any legislative service in your background?

Mr. SIEGAN. As a legislator? I never was a legislator. I may have sought to obtain legislation either from the local city council or from the State legislature. But it was not of any significance in my career.

Senator LEAHY. Have you ever had experience in the executive branch of either State or local government?

Mr. SIEGAN. No, I have not. Let me interject something there. I have been a member of two presidential commissions, if that's what your question includes.

I was a member, as you heard, of the President's commission on housing. I was chairman of the regulations committee. I chaired five public hearings conducted around the country in connection with zoning regulation. I am a member of the national bicentennial commission chaired by Justice Burger.

I have consulted for the Federal Government, for the FTC, for the Justice Department. And for the Department of HUD. And I have done some other matters of that nature, which are set fourth in my resume submitted herewith.

[Resume follows:]

RESUME

BERNARD H. SIEGAN

Home
6005 Camino de la Costa
La Jolla, CA 92037
Telephone: (619) 459-2939

Office
University of San Diego
School of Law
Alcala Park
San Diego, CA 92110
Telephone: (619) 260-4600
x4388

BERNARD H. SIEGAN is Distinguished Professor of Law and Director of Law and Economics Studies at the University of San Diego School of Law.

Mr. Siegan received his J.D. degree from the University of Chicago Law School in 1949, and was admitted to the Illinois and federal bars in 1950. While a student, he served as associate editor of the University of Chicago Law Review. He was a practicing attorney in Chicago until June 1973, when he moved to La Jolla, California. During the 1968-1969 school year he was Research Fellow in Law and Economics at the University of Chicago Law School. At various times between 1955-1970 Siegan was president, secretary, or general partner of enterprises engaged in real estate ownership or development.

Mr. Siegan is the author or editor of seven books. He has written LAND USE WITHOUT ZONING (Lexington Books 1972), OTHER PEOPLE'S PROPERTY (Lexington Books 1976), and ECONOMIC LIBERTIES AND THE CONSTITUTION (University of Chicago Press 1981). Both LAND USE and ECONOMIC LIBERTIES have been widely noted and cited. He is editor of and contributor to PLANNING WITHOUT PRICES (1977), THE INTERACTION OF ECONOMICS AND THE LAW (1977), REGULATION, ECONOMICS, AND THE LAW (1979), and GOVERNMENT, REGULATION AND THE ECONOMY (1980). He has written chapters in 10 books, and numerous articles for professional and popular publications. Between 1974 and 1979, he wrote a weekly column for Freedom Newspapers, appearing in various daily newspapers across the country.

Professor Siegan was a member of then President-elect Reagan's Task Force on Housing (1980-1981). He was a member of the President's Commission on Housing (1981-1982) and chairman of its Regulations Committee. He was a consultant for the windfalls and wipeouts project of HUD (1973-74). He was a Rapporteur for the White House conference on productivity, San Diego (1983). He was a consultant to the Federal Trade Commission (1985-86) and is presently a consultant to the U.S. Department of Justice (1986-). He is a member of the National Commission on the Bicentennial of the U. S. Constitution established by congressional statute (1985-1991).

In 1972, he received the Leander J. Monks Memorial Fund award from the Institute of Humane Studies; in 1975 a special award from the CEEED organization, Newport Beach, CA; in 1976 was named Research Fellow by the Urban Land Institute, an honorary appointment he still retains; in 1980, he delivered the annual Hagood lecture at the University of South Carolina School of Law; in 1981, he received the George Washington Medal from Freedom Foundations at Valley Forge; and in May-June 1986 he delivered lectures on constitutional law and economics at schools, lawyer's associations, and civic groups in Brazil under sponsorship of U.S. Information Agency.

Professor Siegan has been a participant in numerous academic conferences. He was chairman of the Advisory Committee, Rights of the Regulated Conference, Coronado, CA (1976) and of the Advisory Committee, Affordable Housing Conference, San Diego CA (1985). He was keynote speaker at Oregon Land Use Conference, Portland (1984), Affordable Housing Conference, San Diego (1985), and conference on Economic Liberties and the Judiciary, Washington, D.C., (1984). He was chairman of the Conference on the Taking Issue, San Diego, (1976). In December 1984, his book ECONOMIC LIBERTIES AND THE CONSTITUTION was the subject of a conference in which a dozen leading constitutional scholars participated.

Siegan teaches courses on Constitutional Law, Land Use, and Law and Economics. His biography appears in WHO'S WHO IN AMERICA and WHO'S WHO IN AMERICAN LAW.

January 1987

Senator LEAHY. Have you ever served in a quasi-judicial position, such as serving a member of an administrative agency?

Mr. SIEGAN. No.

Senator LEAHY. Have you ever served as an arbitrator?

Mr. SIEGAN. No, the closest thing I would say was as chairman of the regulations committee of the housing commission, we conducted hearings in five cities. Each of the hearings was about 2 days. We had many members from the public coming to testify.

Senator LEAHY. Have you ever had a role in deciding legal disputes in any forum?

Mr. SIEGAN. No, I have not.

Senator LEAHY. Senator Hatch?

Senator HATCH. Thank you.

As I understand it, your nomination came up here early last year?

Mr. SIEGAN. February 2, 1987.

Senator HATCH. So your nomination has been pending for really over a year. You've already had one full hearing; is that right?

Mr. SIEGAN. Yes.

Senator HATCH. I think most of these questions were asked at that hearing, weren't they?

Mr. SIEGAN. Yes, not all of them. But similar.

Senator HATCH. But basically similar type questions. You have had a distinguished academic career. You've written a number of books, is that correct?

Mr. SIEGAN. Yes, Senator.

Senator HATCH. And you've taught really constitutional law and other matters at the University of San Diego law school for the last 15 years?

Mr. SIEGAN. Yes.

Senator HATCH. A few years ago a judge came before this committee, with whom I differed on a very important constitutional issue. That judge did not agree that the death penalty was constitutional, even though the Constitution mentions capital punishment 4 or 5 times directly in the document.

Ultimately, I asked him if he would enforce the law if it included administering the death penalty. And he answered that he would consider it his duty to abide by that Supreme Court precedent and to carry out the law even if he personally disliked that law.

And I might say, that judge got my support, and he now serves in the Federal district court in New Jersey.

Similarly, there may be views you espouse with which I disagree, or with which my colleagues disagree. But I would like to ask you, as I asked the earlier judicial candidate, if confirmed as a member of the Ninth Circuit Court of Appeals, would you carry out the law as written by Congress, or handed down by the Supreme Court, even though you personally disagreed with that law?

Mr. SIEGAN. Yes, sir, without reservation or qualification.

Senator HATCH. So you believe in the principle of stare decisis?

Mr. SIEGAN. Yes, I do.

Senator HATCH. And you have taught that basically throughout your law career?

Mr. SIEGAN. Well, I have considered the question as a classroom matter, of course.

Senator HATCH. In many ways, your writings on constitutional law have been criticized by some on this committee. I have not read all of your writings, but some.

But it seems to me that you have basically taken an academic approach in your writings. In other words, you have reported on the forces that influence the framers one way or another.

You have not, as a general rule, criticized Supreme Court opinions in terms of social policies. Now, is that a fair characterization?

Mr. SIEGAN. That's largely true. I have criticized Supreme Court decisions. But the writing, let's say, in my current book, *The Supreme Court's Constitution*, is largely confined—not completely, but largely—confined to investigating what the framers of the original Constitution thought; the framers of the Bill of Rights thought; and the framers of the 14th amendment regarded as important.

Senator HATCH. Your book is an interesting book. It seems to me that a great deal of attention has focused, of course, on a few of your writings. And I think to the exclusion in some ways, or at least the ignorance in some ways of all consideration of the great efforts you have made to further civil rights, for instance.

For example, I understand that your only work on zoning was considered, quote, out of the mainstream, unquote, by some. In the first place, what was the basis of your early work on zoning, and what made that work controversial, or why should it be considered controversial today?

Mr. SIEGAN. As a research fellow in law and economics at the University of Chicago Law School, I engaged in a project to investigate the absence of zoning in Houston.

And I spent about a year and wrote a very lengthy article, a 76-page article, which appeared in the Journal of Law and Economics, in which I described Houston's system of nonzoning.

I came to the conclusion that Houston was better off with no zoning than it would have been with zoning.

Senator HATCH. Why was that?

Mr. SIEGAN. The absence of restrictions allowed for much greater development, much greater production and competition, with the result that there was more housing, and housing was at a lower cost.

And that would not have occurred, in my view, as I analyzed the case, had zoning been in existence in Houston.

Senator HATCH. And who does that lower cost housing help?

Mr. SIEGAN. Poor people.

Senator HATCH. I see. Minorities in particular?

Mr. SIEGAN. Yes.

Senator HATCH. Well, let me ask you this, why do you think your efforts to eliminate zoning as a means of protecting racial or ethnic boundaries have not been given more attention?

Mr. SIEGAN. I would not venture an opinion on that. But I want to say this. The article has received a great deal of attention in academic circles.

I think it is probably one of the most quoted articles in land use materials. Many land use casebooks cite the article and subsequent writings relating to that article.

So it's not been completely unnoticed. I think I have been quite well noticed because of that particular study.

Senator HATCH. I think that article was basically responsible for getting you on a presidential commission regarding housing.

Mr. SIEGAN. That and I had some additional material after that. I wrote a book following that, "Land Use Without Zoning," and two other books after that and edited four books.

All of those things, I assume, combined, made me a candidate for that commission.

Senator HATCH. And many thought that that article was a basic thrust in the furtherance of civil rights.

Mr. SIEGAN. I would agree with that. I would agree that the absence of zoning, or as I like to think now, the limitation of zoning, is extremely advantageous to minorities and poor people.

My thought is that eliminating restrictions will allow greater production and will lower the cost of housing. Well, that's primarily for the benefit of poor people and minorities.

Senator HATCH. Well, let me state the former question I had asked you about the principle of stare decisis and your willingness to abide by and follow prior precedent. Let me just state it in a slightly different way.

If confirmed, would you approach a case involving the due process and equal protection clauses from the perspective of your own scholarly research? Or would you approach those cases from the perspective of the current Supreme Court of the United States?

Mr. SIEGAN. Certainly from the perspective of the Supreme Court of the United States.

Senator HATCH. And there's no question about that?

Mr. SIEGAN. None whatever.

Senator HATCH. And you would have no problems with that?

Mr. SIEGAN. None whatever.

Senator HATCH. What about in the gray area that Senator Leahy was talking about in some of his earlier remarks, where really there is no prior precedent, and there is lots of room for the making of precedent?

Mr. SIEGAN. Well, the object is to figure out what the Supreme Court has said, and what is the law of the land. Your question also really says, well, where will my own personal views fit into that.

I say to you that my concern is what the law of the land is. Difficult as it is to find, that is my objective.

And lawyers are always finding what the law is. It isn't easy. That's what lawyers are in business for.

Senator HATCH. And they often differ on what they think the law says?

Mr. SIEGAN. Very often.

Senator HATCH. That's what makes for lawsuits and litigation, is that it?

Mr. SIEGAN. That's correct.

Senator HATCH. Well, if you were faced with a situation where a Supreme Court precedent conflicts with your own understanding of the Constitution, which would prevail, the Supreme Court or your own understanding?

Mr. SIEGAN. The Supreme Court.

Senator HATCH. Without question?

Mr. SIEGAN. Without question or reservation of any sort.

Senator HATCH. We've been led to believe that you uniformly criticize Supreme Court decisions. Do you think that is a fair characterization?

Mr. SIEGAN. No, that's simply not true. I wrote a book which was devoted to criticizing the Supreme Court for, in the instances stated, not abiding by the wishes of the framers.

But I support a great deal of what the Supreme Court has done. And I have submitted lists on occasion indicating that.

I think the Supreme Court in the area of speech, privacy, religious freedom, et cetera, et cetera, has done a job that I am not critical about at all.

Senator HATCH. I agree with that. As I look at your writings, you actually find yourself agreeing with the Supreme Court on a great number of decisions and opinions.

Mr. SIEGAN. Yes, yes.

Senator HATCH. I suspect that we have probably heard a great deal of misinformation about your beliefs, really, as people have written about you since your nomination.

And I would like to hear from you firsthand on several issues. Let me just go through them quickly, because my time is running out, and we want to get to Senator Grassley.

Do you believe minimum wage laws are unconstitutional?

Mr. SIEGAN. Say that again.

Senator HATCH. Do you believe the minimum wage laws are unconstitutional?

Mr. SIEGAN. No, sir.

Senator HATCH. Do you believe no deference should be paid to local authorities in cases involving land use or economic regulation?

Mr. SIEGAN. No, sir.

Senator HATCH. Do you believe that it is unconstitutional for the Federal Government to issue paper money?

Mr. SIEGAN. Let me put it this way in response to the question. At present it is obviously not unconstitutional. That issue has been litigated. It has been decided.

As a historian, when I go back and look at what the framers wanted, I think the description you give is accurate of what they wanted.

But that is an issue that was litigated years ago. It has been decided. I would not suggest any change in that whatever. That is the law. And certainly would be followed by me.

Senator HATCH. But it is fair to point out what the Founding Fathers really wanted. That is what some of your scholarly writing was all about, is that right?

Mr. SIEGAN. Yes.

Senator HATCH. Do you believe that school desegregation cases were wrongly decided, and that these vital civil rights were not accurately established by the Supreme Court?

Mr. SIEGAN. Would you repeat that question again?

Senator HATCH. Well, the way I would state it is, do you believe that the school desegregation cases were wrongly decided, or that these vital civil rights were not accurately established by the Supreme Court?

Mr. SIEGAN. Well, I guess we have to go down each case. The *Brown* case, I fully and unquestionably support the result. I differ with the reasoning.

The subsequent cases implementing the *Brown* case, the *Green* case, the *Swann* case, the *Keyes* case, I agree substantially with the principles of those cases. I may not agree with all they contain. But I agree substantially with the important principles of those cases.

But that is really beside the point. That is the law of the land. The only consideration, as a judge, that I would have is, what is the law of the land? And there is no question that the cases referred to and other cases have decided the law in this area, and I am in no position to question that as a judge.

Senator HATCH. All right. Do you believe that States may constitutionally discriminate against minorities in jury service, voting or office holding?

Mr. SIEGAN. The law is settled on that, sir; no.

Senator HATCH. And how about discriminating against women in the same area?

Mr. SIEGAN. Again, the law is completely settled on that. The answer is no.

Senator HATCH. Is it true that you believe States may adopt an official religion and require school prayer?

Mr. SIEGAN. Again, the law is settled on that. The answer is no.

Senator HATCH. Do you believe that Congress is not competent or authorized to enact legislation regulating the economy in areas like reasonable working hours, or like regulating anti-union policies?

Mr. SIEGAN. Congress under the existing law is fully authorized to do those things you mentioned.

Senator HATCH. All right. Well, let me just say this, the case against you——

Senator LEAHY. Orrin, your time is up.

Senator HATCH. I know, my time is up, but I am going to make one comment, and then I will be glad to yield.

The case against you that has been made by some in the press, and by some on this committee, it seems to me, follows a very familiar pattern.

A great deal of misleading information has been promulgated. And your position as a judicial candidate with limitations indicating that you would not have the proper prudence and discretion I think is wrong.

They also indicate that you find it impossible to respond in kind.

Now, all I can say is, I can only hope that my colleagues will pay attention to your statements more than some of these exaggerated press accounts.

And I think you deserve the courtesy of being considered on the basis of your own statements, and the courtesy of being considered on the basis of what you would do when you're on the Ninth Circuit Court of Appeals, rather than on the basis of erroneous and I think extraneous political information.

And I think that is what has happened to you. And I think it is wrong. And I think it is also wrong to think that just certain people in certain molds can be on any particular court.

Some of our greatest justices, some of our greatest judges in this country, have not been trial lawyers. Some of them have.

I think that the diversity that we have on our Federal bench is very, very good. The key, it seems to me, is ability, knowledge, intelligence, ethics, and capacity, and physical capacity.

And I think you have all of those, and I hope that people will give you a fair shake.

Senator LEAHY. We will recognize Senator Grassley. And without objection, the extra time taken by Senator Hatch will not be taken out of Senator Grassley's time.

Senator HATCH. I took just about as much time as you did.

Senator LEAHY. Go ahead.

Senator GRASSLEY. Okay. I appreciate that consideration.

Professor Siegan, I welcome you back before this committee. I know that this is the second hearing on your nomination. And I know, too, that your nomination has been pending for too long of a period of time, from February of 1987.

That is 12 months, and two hearings. And I do not know that there is a vote in sight yet on your nomination, I am sorry to say.

It is a fact that throughout all this time, the citizens of 9 States—California, Oregon, Nevada, Montana, Washington, Idaho, Arizona, Alaska, Hawaii—and two territories, Guam and Northern Mariana, are without a full complement of judges on this ninth circuit.

I think we all know that the people of these States and areas are entitled to a full complement of judges.

In addition to the vacant seat that Professor Siegan would hope to fill, there is another vacancy on the ninth circuit, a vacancy solely attributable to the actions of the U.S. Senate. Because since December, the Senator from Ohio and the Senator from Massachusetts, who do not represent the ninth circuit, of course, have held up the nominations of Stephen Trott to that circuit, and that has been held up on the floor of the Senate. He was voted out of this committee.

Mr. Trott was approved without objection. And as far as I know, there is no substantive objection to Mr. Trott's qualifications to serve as a judge on the ninth circuit.

But I think it's as simple as, Mr. Trott is being held as a hostage. I am not sure, a hostage for what. But he is a hostage of the U.S. Senate like Lt. Col. Higgins is a hostage of extremists in Lebanon. Mr. Trott is a hostage to a dispute that has nothing to do with him or his qualifications.

But of course the real hostages in this maneuvering are the people of those 9 States and two territories, not to mention the remaining judges on the ninth circuit who have to carry the entire burden of increased case load.

And that obviously has to be a struggle for them to do that.

Now, of course with the ascendance of Judge Anthony Kennedy to the Supreme Court, there is now another vacancy on the ninth circuit. And on this score, I urge the Justice Department and the White House—because sometimes they are too slow in filling these vacancies, and making recommendations, too—to expedite their nomination of another candidate to fill Judge Kennedy's vacancy now in that ninth circuit.

Now to some questions. There was brought up here, particularly when Secretary Pierce was here, this issue of the lack of experi-

ence on the Federal circuit. And I think we ought to state right out as a matter of fact that this committee has not always had such a requirement for court of appeals judges.

We have approved people without Federal court experience. One example I remember in the years since I have been in the Congress, when I was in the House, I had a colleague, Abner Mikva, who was named to the D.C. Circuit, and as far as I am concerned, doing an outstanding job even though maybe his philosophy is different than I would appoint to the court. But there was no debate over his qualifications as are being raised today about whether or not you have adequate experience. Because he was a congressman; and that was it.

Now, we have heard repeatedly that you lack trial experience as an attorney in a number of substantive areas, criminal, tax, immigration, just to name a few, that might come before this ninth circuit.

Would you please explain why this lack of trial experience is less important to a circuit court of appeals candidate than it would be if you were to be a nominee to a Federal district court?

Mr. SIEGAN. I think the circuit court judge is given to scholarly duties. It is looking at what happened below and trying to see if what happened below is correct.

That means it is a scholarly effort. Determining what the law is, if the law was correctly applied, and what the facts are.

I have been spending almost 20 years of my life in scholarly activity. I have been seeking out what the law is, whether the law has changed. This has been my life for 20 years.

I will not come to the circuit court into some new job. This is the job I have been doing. That job involves certain modes of work, certain concerns, and even writing ability.

I have as much experience in that regard as one can obtain in 20 years of being a scholar. Even just writing, a lawyer coming with a great deal of trial practice may not know how to write an opinion; his writing may be lacking in certain respects; that is important for lawyers. It is important for the system to know what the law is.

Again, I suggest, I have had sufficient experience to warrant writing very understandable opinions.

Senator GRASSLEY. These complaints being raised about not having trial experience are pretty doggone important in the case of somebody who is going to be a district court judge, whereas a court of appeals judge is different.

Mr. SIEGAN. I would agree certainly with that.

Senator GRASSLEY. Professor Siegan, I do have some questions for you that bear on some of your writings. And they are based on a theme that I often come back to. My colleagues on this committee have heard me talk a great deal with nominees about judicial restraint, the self restraint which checks a judge's instinct, however well meaning, to rewrite the laws already written by political bodies, legislatures, primarily.

And if separation of powers is to mean anything, it must mean that the judiciary reflects the legislature's prerogative to make the laws. There can be no exceptions, as long as the laws passed by the legislature are constitutional.

Judges, therefore, are not permitted to substitute their own judgment for that of the legislature, even when the legislature is misguided as to its purpose or implementation.

Now, having said this, I would like to get your comment on the following passage from one of your books, "Economic Liberties and the Constitution." And I quote from page 321:

> Because of its limitations and infirmities, the legislature should not be the final authority in socioeconomic matters. A strong case can be made that on many issues Congress and the State legislatures do not reflect the views of their constituents. These problems of legitimacy are compounded by problems of competence. Many legislators do not have the knowledge, understanding, incentive, or time to create efficient and effective statutes that will not unnecessarily deprive people of their liberties.

Now, how do you reconcile these views, which suggest a return to the discredited days of *Lochner* v. *New York* with the long accepted doctrines of judicial restraint and separation of powers?

And I think for me, because this does bother me a little bit, you need to be pretty specific.

Mr. SIEGAN. What I have said here is really the kind of language, almost, that the framers of the most important provisions in our Constitution set forth.

I think if you will read what Madison and Hamilton have said, they were not very happy with the legislatures. But they were not sufficiently unhappy to overrule it every time.

They said, the legislature is beset with infirmities, and difficulties. And that was a basic reason for having judicial review; allow the judiciary to look over arbitrary and capricious measures that the legislature enacts.

I hope you don't take this to mean that the legislature doesn't have a firm, fixed role in our society. It does. So does the judiciary.

Similarly, if you look at the 14th amendment, the framers—that was the 39th Congress—were critical of the legislature. State legislatures they held were responsible for slavery.

They wanted to make sure that arbitrary and capricious measures were not the law of the land. And in both instances, the remedy for that was to give the judiciary a significant role.

We now hear similar language from people who are very strong for speech, for religion. There are problems with the legislature. It is not a perfect body.

And while we don't want to do away with it, we want to make sure that it does not arbitrarily and capriciously deprive people of their liberties.

That is why I set that forth, to indicate, to remind people, that there is a significant role for the judiciary, not only in the area I mentioned, but elsewhere.

Senator GRASSLEY. Well, let me go on, then, to another quotation. Starting to quote:

> Even when legislators do have the requisite qualifications, their effectiveness is limited by the need for compromise and for placating politically important constituents.

Now, let me say, now that I have finished that quote, that, you know, anybody that serves in a legislative body cannot help but tend to agree with that observation. It is a fact of life around here, for sure. But I would hope that you are not suggesting that, as a

judge, you can give less effect to duly enacted laws because they are a product of political compromise or constituent pressure.

Mr. SIEGAN. Certainly not. As you point out, this is—I am sorry.

Senator GRASSLEY. No. You go ahead.

Mr. SIEGAN. This is a political process. I respect the political process. I am certainly not here to throw out the legislature.

Senator GRASSLEY. Well, you make a judgment that the Congress has passed a stupid law, or maybe you make a judgment that we really have not represented our constituency or the majority of people, of either the constituency or the country enacting a law. But assuming those laws are constitutional, we do have a right to pass stupid laws. It may not be the correct thing to do, but, I mean, constitutionally it is still the law of the land.

Mr. SIEGAN. Yes. I would not disagree.

Senator GRASSLEY. You do not dispute that? You are telling me your writings do not detract in any way from that basic fact of life?

Mr. SIEGAN. I am saying to you that there is a reason for judicial review. And in supporting that position, I have pointed out that the legislation that judges get should not be considered as final and perfect. It seems to me every citizen who is aggrieved by that legislation should be able to go to a court and say: I am being capriciously and arbitrarily denied of my rights.

The court should look at that, and there are rules that the courts have evolved through the years for determining if that occurs. A lot of that is judgment. But there are rules through which the judges determine if there has been arbitrary, capricious legislation. But that is all.

We do not want the legislature to do things that terribly affect people, either in their rights of speech or press or whatever.

Senator GRASSLEY. But the final guidepost is the Constitution?

Mr. SIEGAN. Certainly.

Senator GRASSLEY. Nothing you have said now detracts from that fact. If the Congress or any legislative body is doing something that is constitutional, the courts cannot interfere.

Mr. SIEGAN. Well, the courts make the decision if it is constitutional. That is the process of judicial review. But I only look at this as people who have written similarly in past years look at it; that we know that the legislature may at times act terribly, and that we have a court to protect individuals from that occurring.

Senator GRASSLEY. Thank you.

Senator LEAHY. Thank you.

Senator Heflin.

Senator HEFLIN. I am sorry I had to miss part of your earlier testimony, and I hope I am not redundant and repetitive in what I might ask.

I have been trying to focus on your nomination and some of your views, and the issue of equal protection is an interesting area in regard to your views on it. It is my understanding that you feel that the Equal Protection Clause pertains more to natural or fundamental rights, and that it is looked upon in property rights.

Will you give me your views pertaining to the issue of property rights as opposed to human rights, and the applicability of the Equal Protection Clause?

Mr. SIEGAN. Senator, I am not sure if you are asking me as a historian or as a student of the current law.

As far as the current law is concerned, I as a judge would have no disagreement with it whatever. So I assume you are asking social policy or history?

Senator HEFLIN. Well, I suppose it would go back to your writings, as an explanation of your writings, which I suppose would mean it would fall more into the history aspect.

Mr. SIEGAN. So long as you understand what I am about to say to you, it is something I would not enforce as a judge unless it was consistent with what the Supreme Court has said.

My general view of liberty is that people in our society should be able to do as they wish. They should be encouraged to act in their own self-interest and for their own betterment.

However, society can draw a line when society feels that there is a sufficient reason for limiting that activity. I think that is true with respect to speech, with respect to the press, with respect to religion, with respect to property and economics. So I go across the board. I do not differentiate and say: Well, this is speech, we should protect it; or this is press, we should protect it.

And you understand what I am saying now does not necessarily coincide with existing Supreme Court doctrine. Again, I take these precautions because so often in questioning from the press, I am quoted as if I were saying something which I will enforce as a judge, even though I am just giving theory.

That is my general theory of the Constitution. It was intended to maximize human liberty all across the board. You want to speak, you want to pray, you want to write, you want to buy property, you want to sell property, you want to enter into a business. I think that is the glory of our society. That should be encouraged, up to the point where government comes along and says: What you are doing is harmful. We have the power when it is harmful, under our police power, to limit what you are doing.

Senator HEFLIN. Well, I suppose though you will follow the dictates of the Supreme Court decisions, there are matters that would come up in the appellate courts which will be, in effect, a new application of the Equal Protection Clause as it would apply to the particular set of facts that are proposed. And I think if we look towards that, do you think that the government has more authority to restrict human freedom in the human element aspect of it, as opposed to property rights?

Mr. SIEGAN. I think that all human activity should be recognized, should be honored across the board. I would not want to elevate certain liberties as against other liberties. Some liberties that you may value someone else may not value.

However, when it comes to limiting liberties, that is a political decision in the sense of the State making a decision as to whether a liberty should be limited in a certain situation or not limited. That is a political situation. And the State itself, when it makes that decision, may value liberties differently.

Senator HEFLIN. Well, if you were on the court, you would have to review that in view of precedents and in view of the interpretation. And sometimes you may have to review it where there is no clear-cut area.

Mr. SIEGAN. That is correct.

Senator HEFLIN. So what I am trying to direct the focus at is what is your general philosophy on your interpretation.

Mr. SIEGAN. I believe the law of the land is that which is set forth by the Supreme Court. It would be my effort to enforce that law without regard to my own positions.

I fully agree: At times it is very easy to tell what the Supreme Court means; at times it is very difficult. My objective, were I given this high honor, would be to try and figure out as closely as I possibly could what the existing law, as interpreted by the Supreme Court, is and enforce that.

Now, that is not an unusual thing for lawyers. I have done that as a clerk. I was asked: Give me an opinion; what is the law in this particular situation? And I remember at times it was easy; at times it was very difficult.

As a lawyer, I did it frequently. I will make the same effort in that regard as a judge that I did in giving my employer as a clerk my opinion as to what the law was. I did not tell him what I thought the law should be. I told him what the law was as best as I could perceive it. Similarly, as a lawyer, I did not think, well, this is what the law ought to be. It is what the law was.

Lawyers do this as a matter of practice. That is the business of lawyers. I intend, if given this high honor, to follow exactly that course.

Senator HEFLIN. Well, the law professors generally have great imaginations, particularly in drafting essay questions to law students, and they generally will endeavor to have a question that is unique, different, that is not covered; but to, in effect, test the law student as to his knowledge and as to his applicability of the law, but generally in an area that is not clearly definable. And I am sure that you have probably drafted many such questions like that.

Mr. SIEGAN. Probably.

Senator HEFLIN. Now, I am trying to direct you to that type of a situation where the law is not clear and to determine what principles in regards to equal protection would you follow where there is no Supreme Court decision on the matter, and where, in effect, it could go either way.

Mr. SIEGAN. From my experience at giving questions of that sort, I find there is some answer. I do not remember it ever being blank. If it were blank, there would be no point to giving that because I am trying to test that which we have discussed during the semester.

There really is never a completely blank story. There is some indication as to what the law is, and I prize people who can put together existing law and tell us how the outcome should be based upon that existing law. That is the kind of procedure I will follow.

What I want to distinguish is following what is on the books, or what can be perceived to be on the books, and what I think. If my personality enters into it, it would be an unconscious decision. Because I am a strong believer in rules and regulations of the society, my efforts will be to follow what I can find to be the law.

And, again, I want to say as one who is well practiced in giving exams, it is not blank most of the time.

Senator HEFLIN. Well, let us assume that it is blank. What criteria would you use?

Mr. SIEGAN. Again, I think the distinction to be drawn is whether I will say it is blank in order to be able to do what I want to do. That is not the case.

The object is to work it out so that there is precedent, there is some way of relating what is there to the situation. The point is to avoid completely using one's personal ideas, one's own background. The object is to put together something that will be acceptable to a higher authority, being the Supreme Court.

Senator HEFLIN. Well, professor, you know as well as I do that in the development of the law, there comes a time when there are blank decisions, whether they are written. And you have to make a decision.

What I am trying to do is to probe as to an interpretation. It is abstract. Maybe with a factual setting it could be clearer, but there ought to be some general principles that you would consider in applying the Equal Protection Clause to a set of facts where there was no binding or controlling opinion of the Supreme Court, or say where there is no even persuasive doctrine that has been established by an appellate court.

What criteria, if you are looking at that from an equal protection basis, would you endeavor to follow?

Mr. SIEGAN. Senator, I would follow the one principle which I think is involved here, and that is the principle that the Supreme Court is the final arbiter of the Constitution.

Now, if you tell me that there are going to be cases where there is nothing—and I very much disagree with you, although you have been a judge and I defer to your experience in that regard. There are not really going to be many cases like that. It may not be readily apparent, but you still can see possibly the orientation, the essence, the spirit, the way the court goes.

I think in theory you can see the difference. It is not me. It is the Supreme Court. I do not mean to say that is going to be at times a very easy course, but nevertheless, that is the course that I propose to take.

Senator HEFLIN. Well, are you telling me that basically what you would do is you would make a determination based on what you thought the then present Supreme Court would rule?

Mr. SIEGAN. That is correct.

Senator HEFLIN. And then if 10 years later the Supreme Court had changed, you would then make a decision based on what you thought the Supreme Court then would decide?

Mr. SIEGAN. Well, let us take the first instance. We have two instances.

I will do what I think the Supreme Court wants done so as to write an opinion that would be confirmed by the Supreme Court. If the Supreme Court wants to change its mind, that certainly is its prerogative. Once it has changed its mind, I would go through the same process in the hope of, again, getting a satisfactory decision of the Supreme Court.

Senator HEFLIN. Well, then, if you had been on the circuit court of appeals during the period in which you would have had decisions that would have been made pertaining to school desegregation, and

the issue of busing came up, and Congress passed a law pertaining to busing, but you anticipated that the Supreme Court might rule differently from Congress, am I correct in saying that you would decide it on what you looked into the crystal ball, made up your mind as to what the Supreme Court would decide rather than the issues of the law and the fact at the time?

Mr. SIEGAN. In the case you give, there is not much problem finding what the law is. I would do exactly what the precedents are. If I felt that those precedents were unwise or unjust, I think my duty would be to leave the courts.

So long as I enter into that position, I will follow my oath of office, which is that I will obey the law of the land. If I find that the law is not to my liking, it is unjust, I have two alternatives. One is to violate my oath; the other is to resign.

I would resign if I could not follow the law of the land.

Senator HEFLIN. Is my time up?

Senator LEAHY. Did you want to follow up?

Senator HEFLIN. Well, I am left in sort of an uncertainty. I think there are certain criteria that every judge follows. He basically attempts to follow the law or, on the other hand, if he is an activist, he is attempting to do something, and there are certain criteria that you have regardless.

I just am left in a little bit of a quandary as to what your general principles and general criteria would be in determining cases that had not been decided by the Supreme Court, which were blank, as you used the word, in those regards.

I think everybody has some criteria of what they follow.

Mr. SIEGAN. I think you have mentioned some. One criterion would be activism: I do not care what it says; this is what I want to do. That is not me.

My principle, I think, is a very simple and very honorable and important principle: Follow the law of the land. That is the oath that is required of a circuit court judge. I do not know any stronger principle, Senator.

Senator HEFLIN. I believe that is all I have.

Senator LEAHY. Thank you.

I am going to leave and turn the chair over to Senator Metzenbaum. But before I do, I want to take a couple of minutes to followup on something Senator Grassley said. He went into the legislative process, and I know in the past you have had some criticisms of the legislative process. I do not want to go into that. We have all had that. In fact, some think that our representative form of government may be the worst kind possible. It is just that it is better than anything else we have been able to come up with. If you want to hear criticism of the legislative process, listen to most of us muttering around here at 3:00 o'clock in the morning.

I want to go into it more than just the question of people having kind of a bull session talk about what is wrong. I want to ask about what might affect your views as a judge.

In your book, "Other People's Property," there is a passage that bothers me. It is on Page 16. Let me read it.

You said:

> What is perhaps the most unfortunate aspect of regulatory legislation is that graft frequently leads to better results for society than the less tainted variety of

politics. Graft may be the only means of removing restrictions and allowing market forces to operate, a shocking and rather shameful situation. Thus, in view of today's housing problems, one may well ask whose actions are more socially undesirable: the untouchable legislator who votes to reject the construction of housing, or the graft taker who approves it.

Now, that book, of course, was published in 1976. So let me just go into some specifics on it.

Do you think that graft frequently leads to better results for society than compliance with regulatory laws would produce?

Mr. SIEGAN. Well, Senator, I was indulging in author's liberties, talking in a way that authors, I think, do to make a point. I was saying: Is it not terrible? That is basically what I've said. Is it not terrible that sometimes graft will lead to a better result than the absence of graft?

I do not favor graft, obviously. What I have written there is about zoning. And at that time—I do not know if the situation has changed, but at that time it was not unusual to read about the graft accusations.

Senator LEAHY. Which is more desirable: honest legislators who vote to regulate economic activity, or corrupt legislators who take bribes and look the other way?

Mr. SIEGAN. Without question, the honest legislator.

Senator LEAHY. Well, you wrote in the paragraph following the one I just quoted that we have a regulatory system "where consumer demand can quite often only be satisfied by resorting to illegal or morally and socially reprehensible practices." Does that hold true today?

Mr. SIEGAN. Well, I do not know if it holds true, but what I am saying is we do not want that sort of activity. We should make the law honest so that we avoid the kind of criminal activity that we have had. We once had a prohibition law. Why don't we have a prohibition law now? We have lots of problems with alcohol. Because prohibition laws, we know, will lead to criminal activity.

And I was suggesting the same thing; that the answer in these cases is not to have laws that no one is going to follow or that can be overturned readily through graft. I do not want graft. I do not want criminal activity, obviously.

Senator LEAHY. Would you have any problem enforcing the law against a public official who took a bribe, even though you were convinced that the action he took as a result of that bribe actually led to a more socially desirable result?

Mr. SIEGAN. None whatever. He has violated the law, and he deserves punishment for it, period.

Senator LEAHY. Thank you.

You know, one of the things that really follows up on what Senator Heflin is saying is that you cannot rely always on precedent. I will give you a copy of an article in the New York Times on January 29, 1988, where Judge Coffin of the first circuit of appeals said, "Precedent is certainly real. We learn to live with it. But if precedent clearly governed, the case would never get as far as the court of appeals. The parties would settle."

Mr. SIEGAN. I am familiar with that article, and I think I would disagree with some of the things that were said there.

Precedent has been a very important item to me as a scholar for a very lengthy period of time.

Senator LEAHY. So we do not put you in a position of having to answer to an article that you do not have before you, would you do me a favor? Would you respond at your convenience and give your reaction to Judge Coffin's statements, and those of other judges, on this article?

Mr. SIEGAN. Sure.

Senator LEAHY. Because I think it goes very much to the key of what I said earlier when a court does not have precedents at all for so many cases that come before it. It goes very much to what Senator Metzenbaum said—I mean what Senator Heflin said.

Senator METZENBAUM. He said it.

Senator HEFLIN. Just get those names right.

Senator LEAHY. You are both wearing blue shirts.

Senator METZENBAUM. We look very much alike.

Senator LEAHY. I thought it was the same person there.

Senator HEFLIN. I will put my glasses on. [Laughter.]

Senator LEAHY. Now you really look alike, except for the different color hair.

But if you would, seriously.

Mr. SIEGAN. Certainly.

[The following material was supplied by the nominee for the record:]

The New York Times article does not directly concern the issue that my nomination presents. As a practicing lawyer for a lengthy period of time, I am fully aware that it is not always simple to determine existing precedent; it may at times be exceedingly difficult. I agree with Judge Coffin that often there is no decisive precedent. The issue my nomination has presented is what should the judge do when precedent is not clear.

The oath of office for a circuit court judge requires him or her to uphold and implement the law of the land as interpreted by the Supreme Court. As lawyers continually do, this requires the judge to dig deeply into the law reports to determine existing law. I have been involved in this task many times, and as Judge Coffin asserts, lawyers may come up with different answers. The point is to always use the decisions of the Supreme Court as a basis for research. Lawyers are frequently given to personal opinions about what the law should be, but obviously this should not enter into the undertaking. The object is to formulate an opinion that would be upheld by the Supreme Court. In the absence of available precedent, the judge should attempt to detemine the general intention or orientation of the court in matters such as the one under consideration. The object is to apply the Court's disposition as distinguished from that of the appellate judge.

An "inferior court" judge—to use the constitutional language—is effectively an agent for the high court in interpreting the law and should proceed on that basis. When an agent is not given prior instruction by the principal—that is, when precendent is not certain—the agent should seek as best as possible to act as the principal would under the circumstances, not as the agent deems best.

Senator LEAHY. Because I think that this is an issue that is of great concern to a lot of people. I will be very frank with you, Professor. I do not question your intellectual abilities. In fact, most people should envy your intellectual abilities. My concern on the lack of experience goes to this: I mentioned earlier that the last time you were in a Federal court I was 12 years old. You do not have that experience.

I do not question your commitment to stay with precedent, to stay with stare decisis. I cannot imagine any judge taking the oath of office and not meaning that. But in my experience in Federal

court and the experience of most practicing lawyers, case after case comes up where there is not a binding precedent that is going to apply to the facts and the law of that case. At that point, the judge has to determine, based on his experience and what is before him, what to do. That is where we are concerned, or at least where I am concerned.

So if you would take Judge Coffin's comments in this article, and let me know your views on it, that would be very helpful to me.

Mr. SIEGAN. May I reply briefly to what you have said?

Senator LEAHY. Of course.

Mr. SIEGAN. I think that as between having experience in Federal court and having the scholarly experience I have, my experience will be more important in finding what the precedent is. That is what I have been doing close to 20 years, figuring out what the law is.

I do not know that it would be helped by my being able to make motions and argue cases in court and trying cases. It is precisely the issue that you mentioned that I think my experience is most suited for.

Senator LEAHY. You make a strong statement in response, and please also understand on any of the questions I have asked you, or anyone else has asked you, when you have seen the transcript if you want to expand on them, of course you will have that right. We would leave that open for you.

We do have another item, a resolution from the Board of Supervisors of the City and County of San Francisco, which will be included in the record. We will also have the record open for letters of support or letters of opposition for this nomination.

[The article and other material referred to by Senator Leahy follow:]

NEW YORK TIMES, FRIDAY, JANUARY 29, 1988

NYT 1/29/88

Precedent for Lower Courts: Tyrant or Teacher

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Jan. 28 — To say that judges of lower courts follow precedent has long been a maxim seemingly unworthy of debate in the American legal system. But that unquestioned belief suddenly lies at the heart of the next round in the battle over the Federal judiciary.

Next month members of the Senate Judiciary Committee face a decision on what it means, if anything, when a lower court judge pledges to be bound by precedent.

A hearing on a disputed nomination to the United States Court of Appeals for the Ninth Circuit is likely to focus attention on the role of precedent much as the hearing on Judge Robert H. Bork's nomination to the Supreme Court transported the right to privacy and the "original intent" of the Constitution's framers from the academic domain into public debate.

'No Discretion Whatsoever'

The nominee, Bernard H. Siegan, is a University of San Diego law professor whose views, in particular his pre-New Deal belief that the Constitution protects "economic liberty," have made him among the most controversial of any Reagan Administration choices for the Federal bench.

Mr. Siegan has sought to reassure critics that "my own thinking is totally irrelevant," as he said in a preliminary Judiciary Committee hearing in November. A judge of a lower Federal court has "no discretion whatever," he said, being bound to follow precedents set by the Supreme Court.

But, in recent interviews, Federal judges, law professors and lawyers indicated the matter was not quite so simple.

Few ever framed the problem more graphically than Benjamin N. Cardozo did in 1921. The future Supreme Court Justice was on the New York Court of Appeals when he wrote, in "The Nature of the Judicial Process," "We do not pick our rules of law full-blossomed from the trees."

Seeking to dispel the notion that judges do little more than "match the colors of the case at hand against the colors of many sample cases spread out upon their desk," Cardozo wrote:

"If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins."

Often No 'Decisive Precedent'

Often there is no "decisive precedent." "Of the cases we hear, 30 to 40 percent are pretty darn close, with no clear lines of authority," Judge Frank M. Coffin of the United States Court of Appeals for the First Circuit said in an interview. "Reasonable judges can and do differ."

Judge Coffin, who was named to the Boston-based court by President Johnson, is author of a well-regarded book on the judicial process, "The Ways of a Judge." Like other judges interviewed, he said he spoke generally, rather than commenting on the Siegan nomination.

"Precedent is certainly real, and we learn to live with it," he said. "But if precedent clearly governed, a case would never get as far as the Court of Appeals: the parties would settle."

That view was echoed by Judge Frank H. Easterbrook of the United States Court of Appeals for the Seventh Circuit, in Chicago.

"Given that litigation is so expensive, why are parties willing to take their cases up?" he asked. "It's because precedent doesn't govern. Precedent covers the major premise. But the mind-set of the judge governs the minor premise."

There are numerous areas that appear to be governed by recent Supreme Court precedent but which, on closer examination, are awash in confusion. One example is church-state relations, which found Judge Easterbrook's court in recent conflict.

In 1984, the Supreme Court ruled that a Nativity scene, part of an official Christmas display outside City Hall in Pawtucket, R.I., did not violate the constitutional separation of church and state. The opinion contained broad observations about the many ways the nation's "religious heritage" can properly be honored, as well as numerous specific references to the more secular elements of the Pawtucket display, like reindeer and a tree. As a result, lower courts ruling on similar but not identical displays have been uncertain whether the opinion established broad or narrow authority for official Christmas celebrations.

Last year a Seventh Circuit panel struck down a Pawtucket-type display — crèche plus Santa Claus and reindeer — that Chicago erected inside City Hall. The majority said the location impermissibly conveyed the clear impression that government tacitly endorses Christianity. Judge Easterbrook dissented, wondering with pen in cheek if that also meant City Hall believed in Santa.

Judge Abner J. Mikva of the Court of Appeals here has been on the giving and the receiving end of ambiguous precedents. Decisions on which he labored to follow Supreme Court precedent have been reversed. Opinions he sought to write clearly were misconstrued by district court judges. "Usually it's because I've been too cryptic," he said.

Judge Mikva, who was named to the appeals court by President Carter, said any judge quickly learned that courts were in constant dialogue with one another and that the law was in a continual state of evolution. It is a realization to savor, not deny, he said, adding, "We see the law being molded right before our eyes."

'We see the law being molded right before our eyes.'

FILE NO. 195-88 RESOLUTION NO. 84-88

(Bernard Siegan appointment to U.S. Court of Appeals 9th Circuit)

URGING CONGRESSIONAL OPPOSITION TO THE CONFIRMATION OF BERNARD SIEGAN TO THE U.S. COURT OF APPEALS 9TH CIRCUIT

WHEREAS, Bernard Siegan's judicial philosophy which purports to be based on the literal intent of the Framers results in extreme views on a broad range of fundamental constitutional doctrines; and,

WHEREAS, Bernard Siegas has stated that it is constitutional for states to discriminate against women and minorities in education, jury services, and voting and office holding; and,

WHEREAS, Bernard Siegan has stated that he believes the Supreme Court exceeded its powers in Brown vs. Board of Education when it ordered desegregation of the schools; and,

WHEREAS, Bernard Siegan has articulated his belief that states are not constitutionally prohibited from adopting an official religion or requiring school prayer; and,

WHEREAS, These positions are extreme and have been repudiated by Constitutional scholars; and,

WHEREAS, Bernard Siegan's views are hostile to the protection of liberty and individual rights; now, therefore, be it,

RESOLVED, That the City and County of San Francisco opposes the confirmation of Bernard Siegan as a member of the U.S. Court of Appeals, 9th circuit and strongly urges the United States Senate Judiciary Committee to reject his nomination; and, be it,

FURTHER RESOLVED, That copies of this resolution be transmitted for signature to the Mayor with a request that San

Francisco be represented before the hearings before the Senate Judiciary Committee and the views of San Francisco be represented on this nomination; and, be it,

FURTHER RESOLVED, That additional copies of this resolution be sent to our representatives in the Fifth and Sixth Congressional Districts as well as to our United States Senators.

Supervisors Nancy G. Walker, Harry Britt, Carol Ruth Silver, John L. Molinari

2036Y-6

Adopted on date of introduction
Board of Supervisors, San Francisco — February 8, 1988

Ayes: Supervisors Britt Gonzalez Hsieh Kennedy Maher Silver Walker Ward

Absent: Supervisors Hongisto Molinari Nelder

I hereby certify that the foregoing resolution was adopted by the Board of Supervisors of the City and County of San Francisco

John L. Taylor
Clerk

File No. 195-88

FEB 11 1988
Date Approved

Mayor

February 7, 1988

Hon. Patrick Leahy
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Leahy:

A few months ago, your courageous vote against the confirmation of Judge Bork to the Supreme Court set the stage for his rejection by the full Senate. That historic vote was a major victory for civil liberties and the rule of law.

Now, unfortunately, those values are threatened once again. President Reagan has nominated Bernard H. Siegan to the United States Court of Appeals for the Ninth Circuit. Mr. Siegan lacks Judge Bork's academic qualifications, and his constitutional views have been universally assailed as extreme and unworkable. Even Judge Bork has joined in this criticism (New York Times, January 13, 1988). Among Mr. Siegan's bizarre and dangerous views are that the Speech Clause does not bind the President; that the Establishment Clause does not bind the states; and that state discrimination against women and minorities in voting, education, and jury service does not offend the Fourteenth Amendment.

The enclosed petition has been signed by 165 students of the Boalt Hall School of Law at the University of California, Berkeley. These students will soon be attorneys, the vast majority of them practicing in California and other states of the Ninth Circuit. They have informed themselves on Mr. Siegan's background, and by their signatures have expressed their lack of confidence in him and their opposition to his confirmation. Please heed their appeal. Vote "no" on Siegan.

Very truly yours,

David C. Fathi

Class of 1988
Boalt Hall School of Law
University of California
Berkeley, CA 94720

OFFICERS
CHAIR
Michael A. Pelavin, Flint
VICE CHAIRPERSONS
Raymond Epstein, Chicago
Rae M. Ginsburg, Boston
Jack B. Jacobs, Delaware
David Lobenboim, Detroit
*Beverly Minkoff, Women's American ORT
Michael Newmark, St. Louis
Ruth Popkin, Hadassah
Arden E. Shenker, Portland, OR
Arnold Sreez, Dallas
TREASURER
Bernard S. White, Washington, DC
SECRETARY
Barry Unger, Philadelphia
PAST CHAIRPERSONS
Albert E. Arent, Washington, DC
Jordan C. Band, Cleveland
Lewis D. Cole, Louisville
Aaron Goldman, Washington, DC
Irving Kane, Cleveland
Jacqueline K. Levine, MetroWest NJ
Theodore R. Mann, Philadelphia
Bernard H. Trager, Bridgeport
Lewis H. Weinstein, Boston
Bennett Yanowitz, Cleveland
EXECUTIVE VICE CHAIRMAN
Albert D. Chernin
ASSOCIATE DIRECTOR
Chanoch V. Brownstone
EXECUTIVE COMMITTEE
(in addition to the officers)
NATIONAL AGENCY REPRESENTATIVES
AMERICAN JEWISH COMMITTEE
Theodore Ellenoff
Howard I. Friedman
AMERICAN JEWISH CONGRESS
Abraham Goldstein
Gary A. Bykowski
B'NAI B'RITH—
ANTI-DEFAMATION LEAGUE
Burton S. Levinson
Seymour Reich
HADASSAH
Ruth S. Hurwitz
Thelma C. Weil
JEWISH LABOR COMMITTEE
Herbert Magidson
Executive Director
JEWISH WAR VETERANS OF THE U.S.A.
Harvey S. Friedman
Edwin Goldwasser
NATIONAL COUNCIL OF JEWISH WOMEN
Lenore Feldman
Sue Pinsky
UNION OF AMERICAN
HEBREW CONGREGATIONS
Harris J. Gilbert
Alexander M. Schindler
UNION OF ORTHODOX JEWISH
CONGREGATIONS OF AMERICA
Sidney Kwestel
Marcel Weber
UNITED SYNAGOGUE OF AMERICA—
WOMEN'S LEAGUE
FOR CONSERVATIVE JUDAISM
Evelyn Auerbach
Franklin P. Kreutzer
WOMEN'S AMERICAN ORT
Bea Ferrell
Gertrude White
COMMUNITY REPRESENTATIVES
Jeffrey Bucholtz, Miami
Rabbi Donald Berlin, Baltimore
Leonard Cole, Northern NJ
Robert Friedrich, Milwaukee
David Goldman, Des Moines
Lucy Goldman, San Diego
Peter Goodstein, Flint
Helen Hoffman, Palm Beach
Howard Kahn, Minnesota
Harvey Kaplan, Kansas City
Jacob Kirshner, Middlesex NJ
Ahrin Kushner, Detroit
Joseph Kornfeld, Houston
Sidney Laibson, Hartford
Lynn Lyss, St. Louis
Howard Miller, Los Angeles
Norman Patz, MetroWest NJ
Burton Perlmutter, Cincinnati
Lester Pollack, New York
Theodore R. Seton, San Francisco
Norman Sider, Indianapolis
Evelyn Smith, Phoenix
JoAnn R. Spiegel, Pittsburgh
Samuel J. Tenenbaum, Columbia, SC
Maynard Ungerman, Tulsa
Herbert S. Wander, Chicago
Barbara Wiener, Fort Lauderdale
Julio Zimel, El Paso
EX OFFICIO
Norman S. Davis, San Antonio
Frederick Frank, Pittsburgh
Milton I. Goldstein, St. Louis
Stuart A. Handmaker, Louisville
Shirley T. Joseph, Buffalo
Albert Kassen, Cleveland
H. Ronald Klasko, Philadelphia
Donald E. Lefton, Miami
Stanley H. Lowell, New York
Israel Miller, New York
Michael G. Rapp, CRC Directors Assn.
Robert A. Rosman, Rhode Island
Steven Schwarz, Wilkes-Barre
Daniel S. Shapiro, New York
H. William Shure, New Haven
Sheldon U. Tenenbaum, Savannah
Norman D. Tilles, Rhode Island
Jerry Wagner, Hartford
Marlon A. Wilen, Philadelphia
Maynard Wishner, Chicago
Judith Wolf, Boston
*Deceased

National Jewish Community Relations Advisory Council
NJCRAC
443 Park Avenue South, New York, N.Y. 10016 (212) 684-6950

22 February, 1988

Senator Joseph R. Biden, Jr.
489 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Biden:

The National Jewish Community Relations Advisory Council (NJCRAC) is the national planning and coordinating body for the Jewish community-relations field, speaking on behalf of the following national member agencies: American Jewish Congress, Anti-Defamation League of B'nai B'rith, B'nai B'rith, Hadassah, Jewish Labor Committee, National Council of Jewish Women, Union of American Hebrew Congregations, United Synagogue of America/Women's League for Conservative Judaism, and 113 community member agencies (listed on the reverse of this letterhead), representing all major Jewish communities in the United States.

NJCRAC and its member agencies have long been dedicated to fostering and protecting democratic pluralism, individual freedom, and civil liberties, in short, to protecting the integrity of the Bill of Rights. Thus we believe that the views of a nominee to the federal judiciary on fundamental national issues, such as civil rights and the separation of church and state, is an important central part of the debate over what factors to consider in screening judicial nominees.

On the basis of these considerations we have carefuly evaluated the nomination of Professor Bernard Siegan to the United States Court of Appeals for the Ninth Circuit. Indeed, we had the opportunity to meet with Professor Siegan for an open and frank exchange of views. This examination has led the NJCRAC to oppose the confirmation of Professor Siegan for the U. S. Court of Appeals. We do not come to this judgment lightly; only in rare and exceptional cases have we taken such a position.

The opposition of the NJCRAC to Professor Siegan's confirmation is founded on Professor Siegan's views of the constitutional protections of fundamental liberties, individual freedoms, and civil rights. In the course of his professional career, Professor Siegan has expressed views that depart sharply from historically-accepted values and constitutional precedents. Professor Siegan opposes the "incorporation doctrine" with respect to the separation of church and state. He has said that

the Establishment Clause of the First Amendment does not apply to states. Indeed, Professor Siegan has written, "By placing a limitation of the central government to advance a national religion, the establishment clause, as originally drafted, safeguards the powers of the states to sponsor or further religions of their own choosing." This may be acceptable as history; it is not acceptable as a basis for judicial decision-making.

Furthermore, Professor Siegan has criticized the Supreme Court for decisions on other constitutional issues including school desegration and free speech. He is highly-critical of the Supreme Court's efforts to enforce its landmark ruling in Brown v. Board of Education. He concludes that under the First Amendment only the Congress may not abridge freedom of speech, and that the Supreme Court has been wrong in upholding a substantial amount of health and safety legislation.

These views, developed over the course of many years, could seriously threaten judicial protection of individual rights and liberties as we know it today, and the court's power to respond to new social conditions. Therefore, we urge that the Committee on the Judiciary reject the nomination of Bernard Siegan to the Ninth Circuit Court of Appeals.

Respectfully,

Michael A. Pelavin
Chairman

Congress of the United States
House of Representatives
Washington, DC 20515

February 24, 1988

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As members of the California congressional delegation, we are writing to express our opposition to the nomination of Bernard H. Siegan to the Ninth Circuit Court of Appeals. We believe that Mr. Siegan's views about the Constitution, as well as his minimal professional qualifications, make him unsuitable to hold this important life tenure position.

If confirmed, Mr. Siegan's decisions will particularly affect our constituents in California. For the 37 million people who live in California, Oregon, Washington, Alaska, and Hawaii, the Ninth Circuit Court of Appeals has the final word on the nearly 5,000 matters decided by that Circuit each year. Only a fraction of those decisions are reviewed by the Supreme Court.

The Senate has recently affirmed its historic constitutional role as co-equal partner with the President in the confirmation of Supreme Court nominees. Especially since the courts of appeal are the courts of last resort in the vast majority of cases decided each year, nominees to the lower federal courts should receive the same careful scrutiny you have given to the Supreme Court nominees.

Although theoretically bound by established precedent, Mr. Siegan would have wide discretion to implement his controversial views in the many cases which do not fall squarely within the framework of existing law. Thus, it is particularly important for your committee to carefully examine Mr. Siegan's constitutional philosophy.

Mr. Siegan has a static view of the Constitution which is derived from his personal interpretation of the "intent of the framers." He has written extensively on the Constitution and individual rights and liberties, expressing views at sharp variance with settled positions and landmark cases in many areas of the law, including civil rights, economic regulations, the

First Amendment, and congressional powers. He has urged vigorous judicial protection of economic interests and minimal protection of individual rights. For example, he believes that Brown v. Board of Education, 349 U.S. 294 (1954), was wrongly decided under the Equal Protection Clause of the Fourteenth Amendment, and he has criticized as unjustified almost every subsequent Supreme Court decision implementing Brown.

His interpretation of the First Amendment would not bar the executive or judicial branches from curtailing individual speech and press freedoms, and could permit state-sponsored school prayer, establishment of a state religion, or direct government assistance to religious schools, all of which both Congress and the Supreme Court have rejected.

In his writing, Mr. Siegan has called into question the modern role of Congress in crafting solutions to economic and social problems. He rejects the historic principle, adopted by the Supreme Court 170 year ago, of congressional authority to implement the powers granted to Congress under the Commerce Clause. This principle is the foundation which has permitted Congress to enact economic and social legislation. Mr. Siegan has argued that Congress is not "competent" to pass such legislation.

Mr. Siegan's professional qualifications are minimal at best. He has never appeared in any federal court in the Ninth Circuit, nor, he has acknowledged, in any other federal court since the early days of his career. Of 24 years of practice ending in 1971, he spent his last 21 years in a dual capacity as both a real estate developer and a real estate attorney. In many instances, it appears his legal work emanated from his own real estate development projects. These are not the outstanding professional qualifications that we should demand for our life tenure appellate judges.

We urge you to reject Mr. Siegan's nomination. The people of California will be ill-served if Mr. Siegan is confirmed to the Ninth Circuit Court of Appeals.

Sincerely,

Don Edwards — George Miller

Gus Hawkins — George E. Brown Jr.

[illegible] — [illegible]

Howard L. Berman

Tony Coelho

Henry A. Waxman

Vic Fazio

Nancy Pelosi

Richard Lehman

Pete Stark

Mel Levine

Edward R. Roybal

Barbara Boxer

Tony Beilenson

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
CHIEF JUSTICE BURGER
RETIRED

February 25, 1988

Dear Mr. Chairman:

The nomination of Bernard Siegan to the United States Court of Appeals for the Ninth Circuit is before the Committee, and I believe there has been at least a preliminary hearing on his nomination. Bernard Siegan is now a member of the faculty of the School of Law at the University of San Diego and has been for a number of years.

In my judgment he has extraordinarily good qualifications for an appointment to the Court of Appeals. He practiced law for about 20 years before going into teaching law, so that he has a very substantial background of experience in how the law works from the standpoint of litigants and the applicants. His teaching experience has given him a new objectivity. I work with him as a Member of the Commission on the Bicentennial of the United States Constitution. In working with him closely for the past two years, I have come to have great respect and admiration for his insights into our constitutional system and its freedoms.

Should you have any questions about my views I would be glad to respond.

Cordially,

Warren E. Burger

Honorable Joseph R. Biden
Chairman of the Senate Committee
on the Judiciary
224 Senate Dirksen Office Bldg.
Washington, D.C. 20510-6275

cc: Members of the Committee on the Judiciary

February 25, 1988

The Honourable Joseph R. Biden, Jr.
Chairman
Judiciary Committee
224 Senate Dirksen Office Building
Washington, DC 20510

Dear Senator Biden:

As lawyers and law professors, we urge the Senate Judiciary Committee to reject the nomination of Bernard H. Siegan to the Ninth Circuit Court of Appeals. We believe that Siegan's theories of constitutional law are so far from mainstream constitutional jurisprudence that he should not be awarded a lifetime appointment with responsibility for vindicating individual rights and liberties under our constitutional system. This letter addresses those of Siegan's theories which we believe highlight his unsuitability for the federal bench.

The Senate has recently affirmed its historic constitutional role as full partner with the President in the confirmation of Supreme Court nominees. It is equally important that the Senate Judiciary Committee give careful scrutiny to those named to federal courts of appeals, which are the courts of last resort with respect to a great majority of cases. For the thirty-seven million people who live within the states that comprise the Ninth Circuit, Siegan's decisions would be final in all but a handful of cases.

Ascribing his philosophy to "original intent," Siegan turns traditional jurisprudence on its head by urging vigorous judicial protection of economic interests and minimal protection of individual rights. He has expressed views at sharp variance with settled positions and landmark cases in many areas of the law, including civil rights, economic regulation, the First Amendment, and congressional powers. His constitutional theories are not supported by any respected legal scholar.

Siegan's fundamental misapprehension of the Fourteenth Amendment is perhaps the most vivid application of his misguided judicial philosophy. Siegan asserts that the Equal Protection Clause protects only "natural" or "fundamental" rights having to do with life, liberty and property. In his view, such rights as the right to vote, jury service and education, are "political" rights which can be bestowed by the democratic branch of government, but receive no direct protection under the Constitution. Siegan relies on this distinction to characterize Brown v. Board of Education, 349 U.S. 294 (1954), as wrongly decided under the Equal Protection Clause of the Fourteenth Amendment and to criticize as unjustified almost every subsequent

Supreme Court decision implementing Brown. In his 1987 book, The Supreme Court's Constitution, Siegan wrote:

> [there is] little authority for the construction that the Court has accorded in the school segregation cases. Although such segregation is totally repugnant in modern society, it does not follow that the Constitution necessarily proves relief in this area.

Siegan's recently-evolved theory, that the Court could have reached the same result in Brown by recognizing school desegregation as an exercise of a right to travel, would not permit any of the remedies the Court has mandated for effective desegregation.

As with race discrimination, Siegan's views on sex discrimination are based on his hierarchical system of constitutional rights. Again contending the Equal Protection Clause protects only "natural" rights, Siegan objects to the Court's imposition of an intermediate level of review for gender cases; he views the Court's decisions employing this standard as unsupported and based on a "matter of policy."

Siegan also interprets the First Amendment narrowly. Claiming that freedom of speech and press originally had a very restrictive meaning, Siegan reads the provision that "Congress shall make no law abridging the freedom of speech or of the press" to extend only to Congress. Consequently, Siegan's literal interpretation would enable the executive or judicial branches to curtail free speech.

Contradicting over forty years of settled Supreme Court case law, Siegan wrote, in The Supreme Court's Constitution, that the Establishment Clause was intended only as a prohibition on the federal government. Because it does not secure a "natural" right, it should not have been incorporated by the Fourteenth Amendment. Application of Siegan's theory could permit state-sponsored school prayer, establishment of a state religion, or direct government assistance to religious schools, all of which the Supreme Court has ruled invalid.

Siegan's views in the area of economic regulation are equally extreme. While he would limit the role of courts in protecting civil and individual rights, he calls for an expanded role for the courts in shielding property and contractual interests from government regulation. In his 1980 book, Economic Liberties and the Constitution and in other recent writings, Siegan favors returning to the era ushered in by the now discredited Lochner v. New York, 198 U.S. 45 (1905), when dozens of health, safety, labor and business regulations were overturned by the Supreme Court as violations of substantive due process. He attacks as "erroneous" the line of cases that rejected Lochner

and upheld important legislative and regulatory programs originating from the New Deal. Further, he states these cases "should be corrected." Siegan's views, if implemented, would threaten minimum wage laws, environmental protection, and worker safety regulations.

Siegan's concern for property interests also leads him to narrow the role of Congress in regulating under the Commerce Clause. He rejects the historic principle adopted by the Court 170 years ago in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), which provided for plenary federal authority to implement those powers delegated to Congress by the Constitution. McCulloch is the foundation of all subsequent holdings allowing the federal government to enact social and economic legislation. In repudiating McCulloch, Siegan disparages the entire corpus of such legislation.

Although circuit court judges cannot exercise the discretion of their Supreme Court brethren, we are deeply concerned that Siegan's legal philosophy will color his judicial decision making. Many issues are simply not governed by precedent; interpretation is required in virtually every decision. As our colleague, Duke University law professor Walter Dellinger has stated, "A potential judge who rejects a very large part of the Supreme Court's jurisprudence will have a difficult time struggling with himself in applying that jurisprudence."

There is certainly room for a wide variety of views among members of the federal judiciary. But citizens are entitled to have their cases reviewed by judges who understand and accept our basic constitutional framework, including the role of the courts in interpreting individual rights and liberties. Bernard Siegan is not such a person. We therefore urge the Senate to reject his nomination.

Sincerely,

LAW PROFESSORS WHO SIGNED LETTER
IN OPPOSITION TO BERNARD SIEGAN'S NOMINATION
TO THE NINTH CIRCUIT COURT OF APPEALS* **

ARIZONA

Jane Aiken, Arizona State University College of Law
Robert Bartels, Arizona State University College of Law
Douglas Blaze, Arizona State University College of Law
Charles R. Calleros, Arizona State University College of Law
Richard C. Dahl, Arizona State University College of Law
Joseph M. Feller, Arizona State University College of Law
Hannah A. Furnish, Arizona State University College of Law
Mark A. Hall, Arizona State University College of Law
David Kader, Arizona State University College of Law
John D. Leshy, Arizona State University College of Law
Gary Lowenthal, Arizona State University College of Law
Alan Matheson, Arizona State University College of Law
Ralph Spritzer, Arizona State University College of Law
Robert Suggs, Arizona State University College of Law
Fernando R. Teson, Arizona State University College of Law

Arthur Andrews, University of Arizona College of Law
Charles Ares, University of Arizona College of Law
Barbara Atwood, University of Arizona College of Law
William Boyd, University of Arizona College of Law
Robert Clark, University of Arizona College of Law
August Eckhardt, University of Arizona College of Law
Robert Glennon, University of Arizona College of Law
Reka Hoff, University of Arizona College of Law
Suzanne Rabe, University of Arizona College of Law
Theodore Schneyer, University of Arizona College of Law
Andrew Silverman, University of Arizona College of Law
Roy Spece, University of Arizona College of Law
Norman Williams, University of Arizona College of Law
Robert Williams, University of Arizona College of Law

CALIFORNIA

Babette Barton, University of California at Berkeley School of Law (Boalt Hall)
Richard Buxbaum, University of California at Berkeley School of Law (Boalt Hall)

---

* The inclusion of law school names is for identification purposes only and is not intended to imply opposition of the Siegan nomination by any school.

** Actual signatures to the letter are attached.

Robert Cole, University of California at Berkeley School of Law (Boalt Hall)
Herma Kay, University of California at Berkeley School of Law (Boalt Hall)
Stephan Kuttner, University of California at Berkeley School of Law (Boalt Hall)
Frank Newman, University of California at Berkeley School of Law (Boalt Hall)
Andrea Peterson, University of California at Berkeley School of Law (Boalt Hall)
Robert Post, University of California at Berkeley School of Law (Boalt Hall)
Harry Scheiber, University of California at Berkeley School of Law (Boalt Hall)
Jerome Skolnick, University of California at Berkeley School of Law (Boalt Hall)
Welsh White, University of California at Berkeley School of Law (Boalt Hall)

Alan Brownstein, University of California at Davis School of Law
Jean Love, University of California at Davis School of Law
Martha West, University of California at Davis School of Law

Marsha Cohen, University of California, Hastings College of the Law
David Faigman, University of California, Hastings College of the Law
Brian Gray, University of California, Hastings College of the Law
David Jung, University of California, Hastings College of the Law
Calvin Massey, University of California, Hastings College of the Law
H.G. Prince, University of California, Hastings College of the Law
Vivian Wilson, University of California, Hastings College of the Law
C. Keith Wingate, University of California, Hastings College of the Law

Alison Anderson, University of California at Los Angeles (UCLA) School of Law
David Dolinko, University of California at Los Angeles (UCLA) School of Law
Julian Eule, University of California at Los Angeles (UCLA) School of Law
Robert Garcia, University of California at Los Angeles (UCLA) School of Law
Robert Goldstein, University of California at Los Angeles (UCLA) School of Law

Kenneth Graham, Jr., University of California at Los Angeles (UCLA) School of Law
Joel Handler, University of California at Los Angeles (UCLA) School of Law
Dirk Hartog, University of California at Los Angeles (UCLA) School of Law
Christine Littleton, University of California at Los Angeles (UCLA) School of Law
Daniel Lowenstein, University of California at Los Angeles (UCLA) School of Law
Carrie Menkel-Meadow, University of California at Los Angeles (UCLA) School of Law
Phillip Trimble, University of California at Los Angeles (UCLA) School of Law

Morton Cohen, Golden Gate University School of Law
Thomas Goetzl, Golden Gate University School of Law
Lawrence Jones, Golden Gate University School of Law
Judith McKelvey, Golden Gate University School of Law
Leslie Minkus, Golden Gate University School of Law
Bernard Segal, Golden Gate University School of Law
Marc Stickgold, Golden Gate University School of Law
Mark Silverman, Golden Gate University School of Law

Mary-Lynne Fisher, Loyola Law School
Edward McGlynn Gaffney, Jr., Loyola Law School
Victor Gold, Loyola Law School
Charlotte Goldberg, Loyola Law School
Allan Ides, Loyola Law School
Samuel Pillsbury, Loyola Law School
Lionel Sobel, Loyola Law School
Lawrence Solum, Loyola Law School
Marcy Strauss, Loyola Law School
Kathryn Tate, Loyola Law School
Kenneth Vogel, Loyola Law School
W. Ruel Walker, Loyola Law School
Michael E. Wolfson, Loyola Law School

Thomas Coyne, McGeorge School of Law, University of the Pacific
George Gould, McGeorge School of Law, University of the Pacific
Lawrence Levine, McGeorge School of Law, University of the Pacific
John Sims, McGeorge School of Law, University of the Pacific
Michaela White, McGeorge School of Law, University of the Pacific

James Kushner, Southwestern University School of Law

Barbara Babcock, Stanford Law School
Ellen Borgersen, Stanford Law School
Daniel Farber, Stanford Law School

Lawrence Friedman, Stanford Law School
Robert Girard, Stanford Law School
William Gould, Stanford Law School
Henry Greeley, Stanford Law School
Thomas Grey, Stanford Law School
Bill Hing, Stanford Law School
Mark Kelman, Stanford Law School
Charles Lawrence, Stanford Law School
Gerald Lopez, Stanford Law School
Miguel Mendez-Longoria, Stanford Law School
Robert Mnookin, Stanford Law School
Michael Wald, Stanford Law School
Robert Weisberg, Stanford Law School

Warren H. Cohen, Whittier College School of Law
John Fitzrandolph, Whittier College School of Law
Mary Ellen Gale, Whittier College School of Law
Richard S. Gruner, Whittier College School of Law
Elwood B. Hain, Jr., Whittier College School of Law
William Wesley Patton, Whittier College School of Law
William Phelps, Whittier College School of Law
H.L. Quadres, Whittier College School of Law
I. Nelson Rose, Whittier College School of Law
Donna Schuele, Whittier College School of Law
Joanne B. Stern, Whittier College School of Law
David S. Welkowitz, Whittier College School of Law

MONTANA

Margery H. Brown, University of Montana School of Law
Bari R. Burke, University of Montana School of Law
J. Martin Burke, University of Montana School of Law
Brenda Desmond, University of Montana School of Law
Larry Elison, University of Montana School of Law
Thomas Huff, University of Montana School of Law
David J. Patterson, University of Montana School of Law

OREGON

Robert C. Art, Willamette University College of Law
Richard F. Breen, Jr., Willamette University College of Law
Claudia Burton, Willamette University College of Law
Bryan M. Johnston, Willamette University College of Law
Susan Leeson, Willamette University College of Law
Ross R. Runkel, Willamette University College of Law
Valerie J. Vollmar, Willamette University College of Law
Michael B. Wise, Willamette University College of Law

WASHINGTON

David Boerner, University of Puget Sound School of Law
Sheldon Frankel, University of Puget Sound School of Law
Deborah Maranville, University of Puget Sound School of Law
Michael Newcity, University of Puget Sound School of Law
Thomas Richardson, University of Puget Sound School of Law
Pierre Schlag, University of Puget Sound School of Law
Richard Settle, University of Puget Sound School of Law
John Weaver, University of Puget Sound School of Law

Robert Aronson, University of Washington School of Law
William Burke, University of Washington School of Law
Jane Ellis, University of Washington School of Law
Joan Fitzpatrick, University of Washington School of Law
Demitri Iglitzin, University of Washington School of Law
Stewart Jay, University of Washington School of Law
Ralph Johnson, University of Washington School of Law
John Junker, University of Washington School of Law
Alan Kirtley, University of Washington School of Law
Richard Kummert, University of Washington School of Law
Martha Lester, University of Washington School of Law
Wallace Loh, University of Washington School of Law
Arval Morris, University of Washington School of Law
Cornelius Peck, University of Washington School of Law
Lea Vaughn, University of Washington School of Law
Louis Wolcher, University of Washington School of Law

TESTIMONY OF JOHN H. BUCHANAN, JR., CHAIRMAN,
PEOPLE FOR THE AMERICAN WAY ACTION FUND
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF BERNARD H. SIEGAN
TO THE NINTH CIRCUIT COURT OF APPEALS

Mr. Chairman, thank you for the opportunity to present my views to you on the nomination of Bernard Siegan, President Reagan's nominee for the Ninth Circuit Court of Appeals.

I am Chairman of the People For the American Way Action Fund. We have over 270,000 members nationwide. We enjoy a diversity among our members that reflects the diversity of this country. Our members include young and old, Republicans and Democrats, liberals and conservatives. The common thread among us is our commitment to defend the Constitution and the rights and liberties it guarantees to all of us.

I would like to commend the committee on the quality of these hearings. By the careful and thorough review you have given this nominee, you have affirmed that nominees to the Courts of Appeals should be considered as thoroughly as nominees to the Supreme Court. Further, you have affirmed that a candidate's judicial philosophy is an important element of your review, especially in a context where that philosophy has been an important factor in securing the nomination.

Our testimony is in opposition to Mr. Siegan's nomination. Our opposition is based on the extreme nature of Mr. Siegan's written views, as well as his lack of practical experience. The nominee's prolific writings set forth his views on doctrines fundamental to our system of law. Across the board he has rejected the United States Supreme Court's interpretations of

the Constitution's essential guarantees, including First Amendment speech and church-state protections and those of the Fourteenth Amendment's Equal Protection clause. In the introduction to his 1987 book, The Supreme Court's Constitution, Mr. Siegan wrote that the Supreme Court "has frequently ruled either contrary to, or without guidance from, constitutional meaning and purpose. It has been more the maker than the interpreter of the law."

Mr. Siegan embraces instead a highly personal and rigid view of the Constitution's meaning. His views on original intent place him at odds with settled law and landmark cases in the areas of civil rights, economic regulation, the First Amendment, and congressional powers. He believes it is the role of courts to challenge regulation of economic interests, while Supreme Court jurisprudence of the last half century has required judicial restraint and extreme deference to expressions of legislative will. Mr. Siegan would protect individual property rights at the expense of any notion that the government may act to further the common good; this runs contrary to the significant modern body of work place, health, safety, and environmental regulatory laws we have come to rely upon today.

In the area of civil rights and individual liberties, Mr. Siegan argues for minimal protection, limiting the reach of the Fourteenth Amendment's Equal Protection Clause to what he terms "natural" rights. Such rights do not include "political" rights such as voting, education, office holding, and jury service. Applying this view, Mr. Siegan charges that the Supreme Court was

wrong when it based the landmark Brown v. Board of Education decision on the Fourteenth Amendment and he criticizes as unjustified almost every subsequent decision implementing Brown. Under his interpretation of Brown, that only the right to travel and not the Fourteenth Amendment renders segregated schools unconstitutional, presumably many other forms of discrimination, such as racially segregated courtrooms or waiting rooms, could be constitutional.

Mr. Siegan's interpretation of the First Amendment would not prevent the executive or judicial branches from curtailing individual speech and press freedoms. He wrote "The First Amendment does not by its terms apply to either of these branches....The language clearly restrains only Congress and no other branch or institution." Under Mr. Siegan's First Amendment, the Establishment Clause would not prevent state sponsorship of school prayer, establishment of a state religion, or direct government assistance to religious schools, all of which both Congress and the Supreme Court have rejected.

In a written report released in January, we outlined in greater detail Mr. Siegan's views on these and other issues. I have attached that report to this testimony for inclusion in the Committee's hearing record. The brief examples I raise here of Mr. Siegan's extreme judicial philosophy have been discussed in these hearings, and in the public debate surrounding this nomination. I review these points again because they illuminate a larger theme of my testimony today -- that Mr. Siegan's nomination should be rejected because his judicial philosophy

lies far outside the mainstream of American legal thought.

When Americans -- lawyers, judges, and lay people -- enter a courtroom, they bring with them a set of basic assumptions. They may have come to dispute specific points in the law - rights, duties, injuries between the parties - but for the most part they rely on a common framework, an understanding gleaned from civics, history, and constitutional law classes about minimal guarantees of the Constitution. Mr. Siegan, in his writing, repudiates and rejects the crucial elements of that common framework.

When we state that he is out of the "mainstream" of judicial scholars, it is to this that we refer. Certainly there is room for a diversity of views on the federal bench, but all federal judges must be believers in the underpinnings of our constitutional rights and liberties.

Mr. Siegan's response to this argument has been to declare that his written work is that of an "historian," and it is "irrelevant" to how he would conduct himself as a judge. Indeed he has pledged to follow Supreme Court precedent faithfully should he be confirmed to the bench. Yet, rarely do cases present themselves which fall squarely within existing precedent. As all advocates know, facts and law can be garnered to support all sides of a case, and careful distinctions can be drawn to avoid one precedent in favor of others. If judging were as simple as merely applying precedent as if it were a mathematical formula, we could have computers instead of judges. It is precisely because the law does not provide automatic answers to disputes that we search so carefully for people with the

requisite experience, intellect, judgment, and fairness of mind to sit as judges. We also search for people who hold substantive views of the law that are within the broad bounds of acceptability in American legal tradition.

In the course of these hearings, Mr. Siegan has been questioned about his professional qualifications. He has readily conceded that he has virtually no litigation, or Federal court experience and little experience in the subject areas likely to come before the Ninth Circuit. This lack of experience handicaps Mr. Siegan even beyond these areas; he also lacks an understanding of the role of a judge and of the process of judicial decision-making. This became evident in the course of his hearings.

During his second hearing before this Committee on February 25, Mr. Siegan revealed how little he understands the work of a circuit court judge. In response to a series of questions on how he would approach a case for which there was no controlling Supreme Court precedent, Mr. Siegan repeatedly disputed that there would be many cases which are without precedent, and stated that he would follow "the law of the land."

In a letter to this committee opposing Mr. Siegan's nomination, former Ninth Circuit Court Judge Shirley M. Hufstedler exposed the flaws in Mr. Siegan's statements. Reacting to Mr. Siegan's pledge at his first hearing that his own views would be irrelevant to his decision-making and that he would seek only to carry out the will of the Supreme Court, Judge Hufstedler wrote,

> Except in the field of criminal law and procedure, the cases before the Ninth Circuit usually concern questions upon which the Supreme Court has not spoken at all or has spoken only indirectly. As a judge, Mr. Siegan could not find the "answers" to the innumerable hard questions before the Ninth Circuit solely from examining Supreme Court authority.... Although all judges of the Ninth Circuit must follow the law as decided by the Supreme Court, that task is the least difficult.

Judge Hufstedler stated that the Ninth Circuit is "constantly" interpreting federal legislation and that "The individual's philosophy inevitably influences his or her decision to read the legislation expansively or restrictively in applying that legislation to particular facts." (Hufstedler letter, 2/17/88)

With all due respect to Mr. Siegan, his promises to adhere to precedent, while well-intentioned, only underscore the fact that in so many instances, his written work squarely rejects that precedent. His work not only disdains the Supreme Court's interpretation of the Bill of Rights and the Fourteenth Amendment, but it also repudiates Congress' economic regulation of the last 50 years. It is not realistic to believe that Mr. Siegan will be able to so completely divorce himself from his long-held views. As Professor Walter Dellinger of Duke University Law School stated, "A potential judge who rejects a very large part of the Supreme Court's jurisprudence will have a difficult time struggling with himself in applying that jurisprudence."

Moreover, from the litigants' point of view, it is only fair that they have confidence that the judge before whom they appear is not hostile to the rights and liberties which they hope to have enforced. Mr. Siegan's written comments on various subjects

would not inspire such confidence. Indeed his statements indicate prejudgment in a variety of critical areas.

For example, he wrote, "Title VII [of the Civil Rights Act of 1964] joins the long list of government programs whose principal accomplishment is the imposition of higher prices and the acceleration of inflation." (Orange County Register, 1/28/78) And he has called supporters of environmental regulation "super-libs" and "Naderites" who "border on the irresponsible" because they seek to have governmental decision-making take environmental factors into consideration. (Orange County Register, 9/22/74, 6/22/75.)

A Court of Appeals judge has considerable power. The Court of Appeals is the court of last resort in the vast majority of cases that come before it. Of the approximately 5000 matters that come before the Ninth Circuit each year, perhaps only 45-50 of them will be heard by the Supreme Court. Thus most of the decisions by this court will be final. Although he would be bound by established precedent as a judge, Mr.Siegan would have the latitude to inject his controversial views in the many cases which do not fall squarely within that precedent. And his decisions, in turn, would function as precedent, not only in the Ninth Circuit, but in other circuits as well, although to a lesser degree.

Because Mr. Siegan's views are so extreme and because he does not have the practical experience that would prepare him to be a judge, we believe that he should not be confirmed for this important job. Mr. Chairman, I urge that you reject this nomination.

People For The American Way
ACTION FUND

PEOPLE FOR THE AMERICAN WAY ACTION FUND'S

REPORT ON BERNARD SIEGAN

January 1988

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. SIEGAN CHALLENGES THE BROAD FRAMEWORK OF CONSTITUTIONAL LAW	6
A. Siegan Challenges Brown v. Board of Education and 30 Years Of School Desegregation Cases	8
B. Siegan Challenges Constitutional Law Prohibiting Sex Discrimination	13
C. Siegan Contends That States May Directly Aid Religion and Sanction School Prayer	15
D. Siegan Writes That The President May Restrict Freedom Of The Press	21
E. Siegan Challenges 50 Years Of Precedent On Economic and Health and Safety Laws	25
II. SIEGAN'S RECORD IS ONE OF INEXPERIENCE IN PRACTICAL LAWYERING SKILLS	35
III. CONCLUSION	37

PEOPLE FOR THE AMERICAN WAY ACTION FUND'S[1] REPORT ON BERNARD SIEGAN

INTRODUCTION

This report has been prepared to explain the opposition of People for the American Way Action Fund to the nomination of Bernard Siegan, a 63-year old law professor from the University of San Diego, to the U.S. Court of Appeals for the Ninth Circuit. Siegan's writings present a clear road map of his judicial philosophy -- a philosophy which is far outside the mainstream of constitutional thought and which contravenes basic legal principles long established under the Bill of Rights and on the 14th Amendment's command for equal protection of the laws and due process.

Siegan offers a static, unyielding view of the Constitution and a rigid framework for constitutional interpretation based on the literal intent of the Framers. Even the most fervent adherents to an interpretivist approach to the Constitution allow for more accommodation to modern needs than does Siegan. He states in the introduction to his book, The Supreme Court's Constitution:

> The strict constructionist solution to interpretation is precise, uncompromising, and best implements neutral principles. According to this view, those who demand change must observe the constitutional mandate for

---

1 People for the American Way Action Fund is a 270,000 member citizen's group dedicated to the preservation of civil liberties and an independent judiciary.

amendment.[2]

As is documented in this report, Siegan's application of his judicial philosophy results in bizarre and radical views on a broad range of fundamental constitutional doctrines and lines of precedent. These views include the following:

1. The Equal Protection Clause of the 14th Amendment does not prohibit states from discriminating against minorities and women in education, jury service, voting, and office holding.

2. Brown v. Board of Education,[3] the landmark case which banned segregated schools, was decided for the wrong reason and the decisions enforcing Brown are not justified by the Constitution. States which refuse to dismantle illegally segregated schools, cannot be forced to do so by the courts.

3. The Establishment Clause of the First Amendment was not incorporated by the Fourteenth Amendment and therefore does not apply to the states. Consequently, states would not be prohibited from adopting an official religion or requiring school prayer.

4. The First Amendment prohibits only Congress from

---

2 Bernard H. Siegan, The Supreme Court's Constitution: An Inquiry into Judicial Review and Its Impact on Society, Transaction Books, 1987 at xi. [hereinafter cited as The Supreme Court's Constitution.]

3 347 U.S. 483 (1954).

abridging freedom of speech; it does not prevent the President from limiting free speech.

5. The Supreme Court has been wrong in upholding a substantial number of health and safety laws. Siegan has criticized the minimum wage laws, toxics related legislation, and other forms of economic regulation.

6. Congress does not have the "competency" to enact legislation regulating the economy. Therefore judges should be willing to strike down economic laws.

These positions are extreme and have been repudiated by constitutional scholars. Even Siegan admits that his constitutional philosophy is at odds with Supreme Court decisions that have long been an essential part of our constitutional framework.

On November 5, 1987, when Siegan testified before the Senate Judiciary Committee in the opening round of his confirmation hearing, he went to great lengths to distance himself from his own extensive body of work, produced in recent years as a law professor. He contended that he was speaking in his work as a "historian."[4] And he asserted several times that his libertarian philosophy and his written criticism of a broad range of settled legal doctrines would not influence him as an appellate judge.

---

[4] Draft Transcript, U.S. Sen. Jud. Comm., November 5, 1987 at 52. (hereafter "Tr.").

He said, "My thinking is totally irrelevant."[5]

At the same time he acknowledged how very out of step his views are with mainstream judicial thinking. In response to a question about his view that the Establishment Clause of the First Amendment was not incorporated by the Fourteenth Amendment and therefore is not applicable to the states, he conceded to Senator Dennis DeConcini that settled law is to the contrary. "I would be laughed off the block if I were to say otherwise.... [W]hat I may think on the subject is really irrelevant in making decisions in the Ninth Circuit."[6] Despite his promises to adhere to Supreme Court precedent, the reality is that as a circuit court judge, Siegan would have considerable discretion in applying precedent to varying fact situations that arise in thousands of district court cases reviewed each year by the Ninth Circuit.

The nominee's extreme views are not of ancient vintage. The most complete expression of his views is in a book published in 1987 that is suffused with criticism of recent Supreme Court precedents. The overarching theme is that the Supreme Court has abused its power over the years by making, rather than interpreting laws. In the introduction to the book Siegan writes:

Little cause for complaint might exist, if in

---

5 Tr. at 60. See also transcript at 57, (discussion of Establishment Clause), at 69 (discussion of Court's review of economic regulation).

6 Tr. at 57.

> exercising its power, the Court was merely implementing Constitutional mandates. Although majority opinions usually assert that the Justices are doing no more than that which the fundamental law requires, a closer analysis casts doubt on this contention.
>
> In this book, I examine the opinions of the Supreme Court in eight different areas... the Court has frequently ruled either contrary to, or without guidance from, constitutional meaning and purpose.[7]

In light of Siegan's consistent criticism of fundamental constitutional principles, the Senate must question his ability to adhere to precedent.

Siegan fails to satisfy the minimum standards for an appellate court nominee. As eminent constitutional law scholar Professor Charles Black has written, "In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness."[8] Siegan's views, discussed in detail below, are so extreme as to exhibit an almost total lack of commitment to the protection of liberty and individual rights. Further, Siegan's professional background shows him to be quite inexperienced as a practicing lawyer. For all these reasons, People For The American Way Action Fund urges the Senate to reject Siegan's nomination.

---

7 The Supreme Court's Constitution, supra at ix, x.

8 Charles Black, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 Yale Law Journal 657, 663 (1970).

I. SIEGAN CHALLENGES THE BROAD FRAMEWORK OF CONSTITUTIONAL LAW

The Constitution contains broad terms, such as "equal protection," "due process," and "privileges and immunities," which are not defined in the body of the document. The accepted view of constitutional interpretation is that the words were deliberately left undefined so that future generations could apply new knowledge and experience in interpreting constitutional questions. As Thomas Jefferson wrote:

> I am certainly not an advocate for frequent and untried changes in laws and constitutions.... But I also know that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as [to require] civilized society to remain ever under the regimen of their barbarous ancestors.[9]

Bernard Siegan disagrees with this view and essentially argues that the Constitution is frozen in time, to be interpreted only as the framers of the Constitution originally intended.[10]

Determining original intent is a difficult task, as even Siegan admits.[11] The record keeping, particularly during the

---

9 Thomas Jefferson, Letter to Samuel Kercheval, July 12, 1816, Writings of Thomas Jefferson, Ed. Paul Ford, Vol. 10, pp.42-43.

10 The Supreme Court's Constitution, supra at Introduction, x. "In lieu of any provision to the contrary, the Constitution should be interpreted... in accordance with the drafters' meaning and intent."

11 Id. at 47 "Determining legislative intent can at times be an arduous undertaking."

drafting of the Constitution in 1787, was poor or nonexistent. The surviving records are primarily shorthand notes summarizing the main points each speaker made. The Bill of Rights and the 14th Amendment were passed by the Second and the 39th Congresses and were ratified by the states. Yet Congressional records do not reflect the intent of those members who did not speak at the debates, and the records of the state ratifying conventions are also incomplete. Siegan ignores these shortcomings and uses writings and the public speeches of a handful of Congressmen to speculate as to the intent of the entire Congress and all the states.

A major theme underlying Siegan's writing on civil rights, property rights and the 14th Amendment involves the distinction which Siegan draws between natural or civil rights -- the protection of life, liberty, and property -- and political rights -- education, voting, jury service and holding office.[12] On sketchy evidence, he concludes that the framers of the 14th Amendment only intended that the courts protect natural or civil rights and not political rights.[13] The latter, he argues, can be protected only if Congress enacts specific laws to implement the Constitution. This position puts Siegan on a collision course with the United States Supreme Court and with accepted constitutional precedent.

---

12 Id. at 89.

13 Id. at 89-93.

A. SIEGAN CHALLENGES BROWN V. BOARD OF EDUCATION AND 30 YEARS OF SCHOOL DESEGREGATION CASES

Among Siegan's most troubling and most peculiar views are his ideas on Brown v. the Board. of Education (1954),[14] and the cases that follow it. While Siegan agrees with the result reached in Brown, he claims the Court's reasoning to be wrong. In addition, he contends that almost every Supreme Court decision enforcing Brown in the ensuing 30 years was unjustified. His consistent intellectual resistance to court-ordered desegregation remedies suggests that he would have trouble adhering to these precedents which he so roundly criticizes.

1. Accepted Constitutional Law

The 1954 landmark case of Brown v. Board. of Education overturned Plessy v. Ferguson (1896).[15] In Plessy, the Court sustained a state law requiring separate but equal public facilities for blacks and whites. Brown rejected "separate but equal" schools as a violation of the 14th Amendment's Equal Protection Clause:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[16]

---

14 347 U.S. 483.

15 163 U.S. 537.

16 347 U.S. at 495.

In the second Brown decision[17] (Brown II), issued in 1955, the Court insisted that schools be desegregated "with all deliberate speed." In cases following Brown II, the Court invoked its constitutional equity powers and mandated remedies to dismantle dual school systems.[18]

2. The Siegan View

In a 1985 article written for the Cato Institute, Siegan terms the desegregation cases "the most flagrant example" of the Court's usurping powers belonging to other governmental bodies.[19] Also in this article, he advances his novel view of the 14th Amendment. Without mentioning Brown by name, but certainly calling it to mind, he wrote that:

> [S]ection I [of the 14th Amendment] safeguards only fundamental and natural rights from violation by the states. There is no fundamental or natural right to education, nor to an integrated education; each is a political right created by government and is accordingly not within the guarantees of the Fourteenth Amendment.[20]

In his book, The Supreme Court's Constitution, Siegan

---

17 349 U.S. 294.

18 See, e.g.: Green v. County School Board 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Board of Education 402 U.S. 1 (1971). The equity power of the courts is derived from Article III, Section 2 of the Constitution.

19 Bernard H. Siegan, "The Supreme Court: The Final Arbiter," Beyond the Status Quo: Policy Proposals for America, Edited by David Boaz and Edward H. Crane, Cato Institute, Washington, D.C. (1985) 283-84.

20 Id.

expounds on this novel view by criticizing Brown, contending the Supreme Court wrongly held school segregation laws a violation of the Equal Protection Clause.[21] Using the century-old terminology, he claims that the Equal Protection Clause only protects "natural" or fundamental rights (life, liberty, or property) and does not apply to state administrative matters, such as schools and other public facilities.[22] As a way to justify Brown, he suggests that the Court could have used an alternate basis to reach the same result -- the right of black children to travel to schools attended by white children.[23]

Siegan's interpretation of the 14th Amendment is not one accepted by courts, found in the body of common law, or taught by scholars. Indeed while Siegan contends that the 14th Amendment does not protect what he terms "political rights" -- such as voting, education, jury service, and office holding -- the Supreme Court has in fact held to the contrary.[24] In addition,

---

21 The Supreme Court's Constitution, supra at 99-100. Mr. Siegan writes:

> Brown I adjudicated the complaints of black children in four states that the separate but equal requirements denied them educational opportunities in violation of the [14th Amendment's] equal protection clause. . . . The opinion is not based on original understanding. Id. at 99.

22 Id. at 89-109.

23 The Supreme Court's Constitution, supra at 102-03, 106-107.

24 In the so-called "one person, one vote" cases, the Court used the equal protection clause to invalidate state legislative apportionment schemes. Reynolds v.

the "right to travel" plan proposed by Siegan is strikingly similar to the so-called "freedom of choice" plans that have been a dead letter ever since the Supreme Court held two decades ago in Green v. County School Board[25] that remedies must provide for effective desegregation. Under Siegan's theory, as under discarded "freedom of choice" plans, segregation assignments could continue for every child who did not exercise a "right to travel."

In Brown II and the cases that followed, the Court specified acceptable methods to desegregate schools. Siegan has written that the Court overstepped its constitutional authority in these cases. He sees the Court's proper role as a "naysayer" -- only able to reject invalid laws and unable to use the equitable powers given it by the Constitution to issue affirmative mandates for school desegregation.[26] Siegan writes:

> [there is] little authority for the construction that the Court has accorded in the school segregation cases. Although such segregation is totally repugnant in modern society, it does not follow that the Constitution necessarily provides relief in

---

Sims 377 U.S. 533 (1964). As early as 1880, the Equal Protection clause was used to void a statute barring blacks from a jury. Strauder v. West Virginia 100 U.S. 303 (1880).

25 391 U.S. 430 (1968). In Green, the rejected "freedom of choice plan" allowed black children the option of traveling to the white school and white children the option of traveling to the black school.

26 Bernard H. Siegan, "Forced Busing," Orange County Register (September 3, 1978). See: The Supreme Court's Constitution, supra at 101-09; "The Supreme Court: The Final Arbiter," supra at 283.

this area. [27]

In fact, Siegan writes that if his "right to travel" theory was adopted by the Court, Brown II would have to be reversed.[28] Siegan writes that the framers' intent and the "right to travel" theory would have prevented the adoption of Brown II:

> By protecting free access [through the "right to travel theory"] the Court would have reached the [same] result in Brown I; Brown II would not have been effected.[29]

This view is not compatible with 30 years of civil rights law and peaceful social change, nor is it supportable. Not only does Siegan misread Brown and misinterpret the 14th Amendment, but he also challenges the courts' equitable powers under Artic III of the Constitution. His theoretical framework would result in the rejection of virtually all of the school integration cases decided by the Supreme Court since Brown. The unifying theme in his writing is his rejection of any role for the courts to remedy unlawful segregation.

In a letter to the Senate Judiciary Committee, constitutional law scholar Laurence Tribe termed Siegan's interpretation of Brown "the most telling illustration of Siegan's radical revisionism." Tribe wrote:

> The notion that it is a black child's freedom to "travel" onto the schoolgrounds that segregation laws infringed is so bizarre and strained -- so incompatible with meaningful enforcement of the right to integrated education and so at odds with ordinary ways of thinking about constitutional law

---

27 The Supreme Court's Constitution, supra at 106.

28 Id. at 107.

29 Id.

-- as to bring into question both Mr. Siegan's competence as a constitutional lawyer and his sincerity as a scholar.[30]

As a result, Tribe concluded that Siegan "must be regarded as far outside any plausible definition of the jurisprudential mainstream."[31]

As an appellate court judge, Siegan would be bound to apply Supreme Court precedent even if he disagrees with it. Nevertheless, he would still be in a position to undermine years of settled and fundamental law. He would have great discretion regarding the appropriateness of specific remedies, and he would be in a position to narrow the applicability of certain precedents.

B. SIEGAN CHALLENGES CONSTITUTIONAL LAW PROHIBITING SEX DISCRIMINATION

Siegan contends that states and the federal government may pass laws discriminating against women in education, jury service, voting and holding office.

1. Accepted Constitutional Law

In numerous cases, the Supreme Court rejected gender-based discrimination as a violation of the 14th Amendment's Equal Protection Clause.[32] The Court observed:

---

30 Laurence Tribe, Letter to Joseph R. Biden, 5/28/87.

31 Ibid.

32 The Court uses the so-called intermediate level scrutiny. See: Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v.

> [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave code. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names....[33]

2. The Siegan View

Siegan's views on sex discrimination are similar to those he expresses on racial desegregation. His analysis in both areas is framed by the natural rights/political rights distinction. Thus, as discussed above, he challenges established constitutional law. He asserts that the Equal Protection Clause does not prevent discrimination in education, jury service, office holding and voting and that the clause protects only so-called "natural" rights, having to do with life, liberty and property.[34]

Most troubling is Siegan's suggestion that the Court's decisions barring gender discrimination are morally objectionable:

> A definitional equality in gender is being protected at a price -- possibly a very significant one. Making this outcome even harder to justify is the dubious authority of the Court in the matter. As has frequently occurred in other areas, the Court's projected moral position is compromised by the harm it imposes on those who trace their rights to original understanding. [The Court's rulings in the gender area]... results in both benefits and costs and when improperly effected is morally as well as legally

---

Boren, 429 U.S. 190 (1976).

33 Frontiero, 411 U.S. at 685 (plurality opinion).

34 The Supreme Court's Constitution, supra at 137-47. For Siegan's views on the desegregation cases, please see Part III.A. of this report.

96-183 0 - 89 - 39

objectionable. (Emphasis added.)[35]

C. SIEGAN CONTENDS THAT STATES MAY DIRECTLY AID RELIGION AND SANCTION SCHOOL PRAYER

Siegan challenges longstanding Supreme Court law safeguarding the First Amendment's separation of church and state. The implementation of Siegan's views would permit direct state aid to churches and religions and would sanction school prayer.

1. Accepted Constitutional Law

The opening words of the Bill of Rights -- "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"[36] -- have provided the constitutional framework for this country's blending of religious freedom, diversity, and harmony.[37] These two First Amendment provisions are commonly called the Establishment Clause and the Free Exercise Clause.

In the 40 years since its decision in Everson v. Board of Education,[38] the Supreme Court has repeatedly held that the Establishment Clause applies to the states and thus limits both

---

35 Id. at 141.

36 U.S. Constitution, Amendment 1.

37 Norman Redlich, The Separation of Church and State: The Burger Court's Tortuous Journey, in The Burger Years: Rights and Wrongs in the Supreme Court 1969-1986 56 (1987).

38 330 U.S. 1 (1950).

the federal and state governments' role in religion:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[39]

Most recently, in the case invalidating the Louisiana creationism law, Edwards v. Aguillard (1987)[40], the Court reiterated the view that the Establishment Clause prohibits state action promoting religion.

2. The Siegan View

Siegan contends that the Establishment Clause is solely a restraint on federal government spending to promote religion:

> By placing a limitation on the authority of the central government to advance a national religion, the establishment clause, as originally drafted, safeguards the powers of the states to sponsor or further religions of their own choosing.[41]

Because the Clause is merely a restraint on the power of the federal government (and not the protection of a "natural right,") Siegan has argued that the Clause is not incorporated by the Fourteenth Amendment and does not limit a state's role in

---

39 330 U.S. at 15-16 (citations omitted). See also: Wallace v. Jaffree, 472 U.S. 38 (1985).

40 482 U.S. ___, 96 L.Ed. 510, 107 S.Ct. ___ (1987).

41 The Supreme Court's Constitution at 118.

promoting or advancing religion.

Siegan criticizes 40 years of settled Supreme Court precedent which incorporated the Establishment Clause and has prevented states from promoting religions:

> The U.S. Supreme Court has never authored a majority opinion that provides a reasoned explanation for why the fourteenth amendment's due process clause incorporates the establishment provision.[42]

Nonetheless, in the 40 years since Everson, only one Supreme Court Justice has even hinted that the Establishment Clause is not incorporated in the 14th Amendment.[43] We are aware of only one Federal District Court decision which has articulated this view. In 1983, Judge Brevard Hand ruled that the Establishment Clause did not apply to Alabama and on that basis upheld Alabama's school prayer law. He was promptly reversed.[44]

The consequences of Siegan's position would be disastrous for any notion of church-state separation. Literally applied, Siegan's theory could permit a state to establish a particular religion as its official religion, to provide direct financial aid to some, or all, religious schools, or to provide for sectarian prayers to be taught in the schools.

To avoid at least some of these consequences, Siegan

---

42 Id. at 120.

43 When he was an Associate Justice, William Rehnquist alluded to this view. See, Wallace v. Jaffree, supra at 106 (1985) (dissent).

44 Judge Hand's ruling was reversed by the 11th Circuit Court of Appeals, which was upheld by the Supreme Court in Wallace v. Jaffree, supra.

suggests, in passing, that the 14th Amendment's equal protection and due process clauses would "protect against discriminatory laws that either gave preference to or imposed restraints on members of particular religious sects or societies."[45] But Siegan's stated views about the lack of 14th Amendment protection in other areas of the law -- such as race and gender discrimination -- raise serious doubts about the protections from discrimination which minority religions would receive under this approach.

Siegan's view is also based on faulty historical analysis. The link between the nonestablishment of religion and religious freedom was made as early as the 1780s by James Madison and Thomas Jefferson, and even earlier by Roger Williams and the Baptists. It has been a part of American constitutional law ever since. Madison's Memorial and Remonstrance and Jefferson's Bill for Religious Liberty both link freedom from supporting religious institutions to "religious liberty" -- indeed, Jefferson's bill against public financial aid to any and all religions is entitled "A Statute for Establishing Religious Freedom." Although four states had established churches in 1787, by 1833 the establishments had all been abolished and every state entering the union after adoption of the Constitution incorporated both provisions in its constitution or basic laws.[46] Even those who

---

45 The Supreme Court's Constitution, supra at 119.

46 Leo Pfeffer, Church, State and Freedom (rev. ed. 1967) 142.

do not believe in complete separation of church and state and who criticize the Court's school prayer decisions see separation as an instrumental principle which promotes religious freedom.[47]

Siegan fails to cite anything in the 14th Amendment's legislative history to support his view that the 14th Amendment's framers did not intend to incorporate the Establishment Clause and to have it apply to the states.[48] In fact, a few years after the 14th Amendment was ratified, Congressman John Bingham of Ohio, whom Siegan praises and approves as the author of the 14th Amendment[49], described what he had intended to include in that Amendment. In doing so, he read the entire Bill of Rights, word for word.[50]

Siegan finds nothing in the Constitution to prohibit official school prayer. In an argument reminiscent of Federal District Court Judge W. Brevard Hand's 1987 ruling that banned classroom textbooks which espoused the "religion" of "secular humanism," Siegan criticizes the opposition to school prayer, contending:

[It] is based on an inaccurate assessment of

---

47 Wilber Katz in Pfeffer, supra at 135-36.

48 The Supreme Court's Constitution, supra at 113-130.

49 Id. at 56-63; Bernard H. Siegan, Economic Liberties and the Constitution: Protection at the State Level, 4 The Cato Journal 689-90 (1985) [hereinafter, Protection at the State Level].

50 Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986); Cong. Globe, 42nd Congress, 1st Session, appendix 84 (1871).

> contemporary American schools, that they are neutral--antiseptic--centers of learning without partisanship toward any dogma or doctrine. In fact, whether by accident or design, teachers and textbooks are not always sterile disseminators of information, nor can they be expected to be. Schools are subject to a wide variety of opinion, but, due to the [Supreme] Court's rulings.... [T]he free exercise of religion frequently may be at a competitive disadvantage in the classrooms.
>
> ...No law prevents teachers from furthering... general tenets of Humanism, which rejects most major traditional religious concepts. Thus, when teachers proclaim people's competency to shape their own lives, as so often occurs, they deny the idea held by many religious persons that people are dependent for their existence and future on a Supreme Being. Textbooks may espouse "relativism" in areas of moral concern to religious people. These books tend to de-emphasize personal integrity, patriotism and family loyalty, each of the highest priority to those who practice traditional religion. Nevertheless, religious persons are forbidden to invoke modest prayer to assert their beliefs.
>
> ...Given this state of affairs, religious prayer provides a perspective that augments pluralism and diversity. It offers moral and ethical values that might not otherwise be disseminated in the public schools or that might be partisanly condemned. "Neutrality" in the classroom, it seems, requires, rather than rejects, some traditional religious input.[51]

Siegan dismisses any claim that official school prayer might infringe the liberty of those who decline to participate:

> In the absence of constitutional controls, it might be feared that schools will be inundated with religious prayers and learning. It is doubtful that the religious groups have the will, political power or unity to achieve this result. Equally important, the dissemination in the classroom of other and counter messages is inevitable as contemporary experience reveals, moreover, due process limits input harmful to religious liberty.[52]

---

51 The Supreme Court's Constitution, supra at 128-30.

52 Id. at 130.

But as Justice Sandra Day O'Connor pointed out in Lynch v. Donnelly,[53] the issue is whether an official action amounts to a

> government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.[54]

Whether that is all that the Establishment Clause protects is disputed, but there is virtually no dispute that it includes at least the elements in Justice O'Connor's formulation.[55] Siegan's view is completely at odds with this analysis.

If adopted, Siegan's views would threaten religious liberty and encourage dangerous governmental entanglement with religion, to the detriment of both religion and government. His views have no historical or any other justification and have long been repudiated.

D. SIEGAN WRITES THAT THE PRESIDENT MAY RESTRICT FREEDOM OF THE PRESS

Adopting a position contrary to years of Supreme Court precedent, Siegan has written that the First Amendment's freedom of speech and press requirements apply only to the Congress and not to other branches of the federal government.

---

53 465 U.S. 668 (1984).

54 Id. at 688.

55 Wallace v. Jaffree 472 U.S. 38 (1985).

1. Accepted Constitutional Law

The First Amendment provides strong safeguards for free speech and press:

> Congress shall make no law... abridging the freedom of speech or of the press...

This amendment has been interpreted historically, without question or comment, to restrain the "government" -- all three branches -- from abridging the freedom of speech.

Before the landmark Supreme Court case of New York Times v. Sullivan (1964),[56] the law of libel was an intricate body of state-created law constructed without reference to constitutional guarantees of free speech.[57] In Sullivan, the Court, seeking to ensure an "uninhibited, robust, and wide-open" public debate, gave the press broad protection against public officials suing for libel. In subsequent cases, the Court extended and clarified these protections, continuing to balance the First Amendment interests of the press with the states' interests in maintaining individuals' rights of reputation.[58]

---

56 376 U.S. 254.

57 Gerald Gunther, Constitutional Law (1980) at 1333.

58 In Curtis v. Butts 388 U.S. 130 (1967), the Court extended the Sullivan protection to libels of public figures as well as public officials. In Gertz v. Welch 418 U.S. 323 (1974), the Court held that with respect to a libel of a private individual (but where the libel involves a matter of public concern), the Constitution does not require malice to be proven in order to recover actual damages but must be proven to recover presumed damages or punitive damages. And in Dun and Bradstreet v. Greenmoss Builders, 472 U.S.749 (1985), the Court held that with respect to a private individual and speech involving no matters of public

2. **The Siegan View**

In a view of the First Amendment unsupported by history or any recognized authority, Siegan argues that the First Amendment does not restrain the executive or judicial branches of the federal government from curtailing free speech:

> The first amendment does not by its terms apply to either of these branches. It says "Congress shall make no law abridging the freedom of speech or of the press."
>
> The language clearly restrains only Congress and no other branch or institution.[59]

Thus Siegan argued that the Supreme Court was wrong when it rejected the Nixon Administration's efforts to stop the New York Times from publishing the Pentagon Papers:

> All the justices [in the Pentagon Papers decision[60]] assumed the [first] amendment applies to the federal administration. One does not have to be a profound constitutional scholar to be wary about the exercise of such power by an unelected group of nine persons.[61]

---

concern, the Constitution does not require that malice be proven in order to recover either presumed or punitive damages.

59 Bernard H. Siegan, "Altering the Constitution," Orange County Register (March 25, 1979). See: Bernard H. Siegan, "Rights of Journalists," Orange County Register (November 19, 1977); Bernard H. Siegan, "The First and the Fifth," Orange County Register (January 7, 1978).

60 In New York Times Co. v. United States 403 U.S. 713 (1971), the Court held that in the absence of any valid statutory authority, the executive branch had no "inherent power" to restrain publication of the Pentagon Papers and that such an injunction would violate the First Amendment.

61 Siegan, "Altering the Constitution," supra.

Presumably, by this view the President could have stopped the television networks from broadcasting the Iran/Contra hearings. No Supreme Court justice has ever argued that Congress is subject to First Amendment restrictions while the other branches of government are not.

Siegan is also highly critical of Sullivan and its progeny, claiming that as a result of these cases:

> The integrity of public communication as well as the quality of the national dialogue were diminished. Accordingly, the press freedom that the Court has advanced is far from an unqualified blessing.[62]

In fact, he claims that the Court was wrong in interpreting the First Amendment to afford protection to the press from some applications of state libel laws.[63]

According to Siegan, "press freedom, as we now understand it,... was created subsequently by the nation's courts"[64] and means nothing more than giving special treatment to the "publishing industry".[65]

---

62 The Supreme Court's Constitution, supra at 173.

63 Id. at 175-76.

64 Bernard H. Siegan, "A Privileged Industry" Orange County Register (August 13, 1978)

65 Bernard H. Siegan, "Priority of Liberties," Orange County Register (August 20, 1978).

E. SIEGAN CHALLENGES 50 YEARS OF PRECEDENT ON ECONOMIC AND HEALTH AND SAFETY LAWS

Under the Constitution, Congress and the states have broad powers to enact economic or social welfare legislation.[66] Today, this type of legislation affects virtually every aspect of American life including such broadly diverse areas as the economy, public health and safety, environmental protection, communications, working conditions, and business practices.

Siegan argues that for the past 50 years, the Supreme Court has been wrong in upholding much of this legislation. He considers the Burger Court as guilty as its predecessors in giving free speech, free press, and the free exercise of religion more constitutional protection than they deserve, and more protection than is accorded to property rights, such as the right to conduct business, to buy and sell real estate and to enter into contracts.[67] Siegan proposes a return to the days when the Supreme Court rejected minimum wage laws, standards for reasonable working hours and legislation designed to stop anti-union practices.

---

66 The Commerce Clause of the Constitution (Article I, Section 8) gives Congress the power to regulate aspects of economic activity that affect more than one state. This generally extends to all forms of interstate movement of persons, property and communication. As a rule, states may enact economic legislation if the law is a reasonable one to achieve a legitimate legislative purpose.

67 The Supreme Court's Constitution, supra at 41-42.

1. Accepted Constitutional Law

From 1897 to 1937, during a period in legal history known as the "Lochner era," the Supreme Court used the theory of substantive due process to invalidate some 200 federal and state regulatory laws. This theory, derived from the 14th Amendment's due process clause, gave "economic and property rights" special and privileged protection. Legislation concerning labor relations, price regulation, and business licensing was frequently rejected by the Court as interfering with "economic and property rights."

In Lochner v. New York (1905),[68] the Court rejected a New York statute which limited hours bakers would work. Under the New York law, bakers could not work more than 10 hours a day nor more than 60 hours per week. The Court concluded that the statute interfered with a fundamental liberty -- an employer and employee's right to agree to working conditions.

As the Depression deepened and economic conditions worsened, dissatisfaction grew both on and off the Court over the use of the substantive due process theory to invalidate important state and federal legislation. The Lochner era ended in 1937, when the Court upheld a minimum wage law.[69] Over the next several years, the Court began deferring to legislative authority to enact economic legislation.

---

68 198 U.S. 45.

69 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). The specific statute upheld was a Washington State law requiring a minimum wage for women.

Since 1937, the substantive due process theory has not been used to invalidate economic legislation,[70] and in this area of the law, the theory remains totally discredited.[71] Today, when reviewing an economic regulation, the Court will presume its constitutional validity and will uphold the statute if it is a reasonable way to achieve a legitimate legislative purpose.[72] Under this standard of review, few economic laws are rejected today.

2. The Siegan View

Siegan contends that the Supreme Court has erred over the last 50 years in sustaining the constitutionality of most economic laws:

> [C]ontemporary construction of the Federal Constitution that prevents its application to restrictions upon economic activity is erroneous and should be corrected.[73]

Siegan is not a traditional conservative arguing for judicial restraint. Rather, he is a judicial activist who questions business and economic laws and who wants the courts to scrutinize closely legislation interfering with what he calls a "natural

---

70 Gunther, supra at 540.

71 Laurence H. Tribe, American Constitutional 446-455 (1978); Gunther, supra at 502-04.

72 See: United States v. Carolene Products Co., 304 U.S. 144 (1938) ; Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963).

73 Bernard H. Siegan, Economic Liberties and the Constitution 7 (1980). (Emphasis added)

right" -- the right to use one's property as one wishes. His philosophy combines several elements: (1) a legal theory that the Constitution and its amendments should be interpreted only as he believes the framers intended; (2) a nostalgic revisionist view of economic history; and (3) a contempt for Congress' ability to formulate economic regulation.

He argues that Lochner, and not the past 50 years of constitutional precedent, properly interprets the intent of the 14th Amendment's framers:

> The evidence is very persuasive that Lochner was a legitimate interpretation of original meaning [of the 14th Amendment] and that the current standards [of constitutional law]... are not supported by the [A]mendment's history.[74]

The legislative history he cites, however, is inconclusive,[75] and Siegan has a view of the Lochner period that is inconsistent with historical reality:

> Because relatively few welfare laws and unions existed in [the Lochner era], the betterment of life must be attributed to the success of the economic system.... The Supreme Court's concept of liberty enabled the economy to continue providing a great measure of material benefits.[76]

---

74 The Supreme Court's Constitution, supra at 45. Also, see: Economic Liberties and the Constitution, supra at 30, 31, 32, 60.

75 The Supreme Court's Constitution, supra; Economic Liberties and the Constitution, supra; Protection at the State Level, supra. While Siegan cites debates and writings of the 39th Congress, the framers of the 14th Amendment, the collective intent of the whole of Congress and of the ratifying states is ambiguous and inconclusive.

76 Economic Liberties and the Constitution, supra at 125.

He never takes notice that, during this era, the economy of the country was shaped by events beyond the control of the Court, including the Great Depression, numerous recessions, labor strife and the breakup of the great monopolies. Maybe more important, this view of "material benefits" ignores the evils of sweatshops, grinding poverty, the exploitation of child labor, and health and occupational hazards.

The far-reaching impact of Siegan's position is revealed by his analysis of leading Lochner era cases. In two anti-union cases cited with approval by Siegan,[77] the Court in 1908 and 1915 endorsed the economic property rights of employers over the rights of employees. The Court concluded that state laws inhibiting the ability of employers to ban unions deprived them of a property right. Thus, it allowed employers to fire employees who joined unions.[78] In defending these decisions, Siegan argues that "union policies encouraged inefficiency"[79] and uses the following statement made in 1869 in an attempt to justify his position:

---

77 Adair v. U.S., 298 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915). See: Economic Liberties and the Constitution, supra at 121-25.

78 298 U.S. at 175; See: Economic Liberties and the Constitution, supra at 123. In Adair, supra and in Coppage, supra, the Court invalidated state laws that prohibited the so-called "yellow dog" contracts. In signing a "yellow dog" contract, an employee agreed, as a condition of employment, not to join or become or remain a member of any labor organization.

79 Economic Liberties and the Constitution, supra at 124.

> [Unions] are contrived for the express purpose of making work inefficient; they positively prohibit the workman from working hard and well, and in order that it may be necessary to employ a greater number.[80]

In a 1923 anti-minimum wage case cited with approval by Siegan,[81] the Court again endorsed the economic property rights of employers to the exclusion of employees. In that case, the Court struck down a minimum wage for women and children calling the wage "a compulsory exaction from the employer for the support of a partially indigent person, for whose situation there rests upon [the employer] responsibility...."[82] Over the years, Siegan has continued to criticize the minimum wage as an example of the "limitations and infirmities of government regulation."[83]

---

80 Id.

81 Id. at 143-150, 191 discussing Adkins v. Children's Hospital 261 U.S. 525 (1923).

82 261 U.S. at 557-58.

83 "Unemployment in 1979," Orange County Register (January 14, 1979). Siegan wrote:

> Although the economic studies have not led to the elimination of the minimum wage, they may have tempered the amount provided in the 1977 legislation [which raised the minimum wage by 35¢ beginning in January 1977]. Perhaps most important, these studies and others like them serve the political process by demonstrating the limitations and infirmities of government regulation. The evidence continues to mount that those well-intended laws designed to transfer wealth from the rich to the poor do not work and harm the poor most of all.
>
> As a consequence, there has been a significant shift in academic opinion on the desirability of these laws. Ten years ago, anyone who opposed minimum wage laws was considered a dodo or a Scrooge. Now those taking this position only risk being regarded as

In addition, Siegan challenges the 168 year old, landmark case of McCulloch v. Maryland 17 U.S. (4 Wheat.) 316 (1819), which established the principle of broad powers for Congress under the "necessary and proper" clause. McCulloch broadly interpreted the implied powers given to Congress under the Constitution's "necessary and proper" clause (Article I, Section 8). The case permitted Congress to use all means not prohibited by the Constitution and rationally related to Congress' enumerated powers, to implement its enumerated powers. This is the primary standard used today for judicial review of congressional action.[84] Siegan argues that McCulloch was an inaccurate interpretation of the intent of the Constitution's framers.[85] Siegan contends that "the major substance of [Chief Justice] Marshall's opinion [in McCulloch] is questionable," and that the opinion "described a scheme of government that had little relation to the one established [by the framers] in 1789."[86]

As is evident from the discussion above, Siegan has a deep distrust of the legislative process. As a check, in the economic sphere he advocates judicial activism. In unambiguous language,

---

scholarly.

See also: Bernard H. Siegan, "Countercurrent v. Regulation," Orange County Register (October 1, 1978).

84 Laurence Tribe, American Constitutional Law 230 (1978).

85 The Supreme Court's Constitution at 11-18.

86 Id. at 13.

he claims that the legislative branches are not competent to enact legislation affecting business and the economy:

> Because of its limitations and infirmities, the legislature should not be the final authority in socioeconomic matters. A strong case can be made that on many issues Congress and state legislatures do not reflect the views of their constituents. The evidence is similarly persuasive that numerous critical provisions of statutes do not represent or are contrary to majoritarian will. These problems of legitimacy [of Congress and legislature] are compounded by problems of competency. Many legislators do not have the knowledge, understanding, incentive, or time to create efficient and effective statutes that will not unnecessarily deprive people of their liberties. Even when legislators do have the requisite qualifications, their effectiveness is limited by the need for compromise and for placating politically important constituents.[87]

In fact, he questions whether Congress or state legislatures "reflect the views of their constituents" on economic issues:

> These limitations and infirmities [of the legislative process] compromise the credibility of the legislature as the representative of the political majority and therefore [compromise the legislature's] entitlement to final authority over legislation. The legitimacy of imposing restraints on the public diminishes as the legislative role and purpose become less credible. Therefore, the need for the judiciary to safeguard [economic] liberties of those affected by legislation increases.[88]

To guard against what he calls legislative "infirmities," Siegan argues that judges should be activists by conducting a broad judicial review of legislative decision-making, and be more willing to strike down economic laws. Siegan would test regulations against a far more rigorous standard than the Court

---

87 Economic Liberties and the Constitution, supra at 321. (emphasis in original)

88 Ibid.

uses today. Siegan's proposed judicial standard to determine the constitutionality of economic legislation appears even more difficult to meet than the standard used by the Supreme Court in Lochner.[89]

In Lochner, the Court held that an act is constitutional when it meets the following standard:

> The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.[90]

The following is Siegan's proposed standard for determining the constitutionality of economic regulation:

> As envisioned here, due process scrutiny would apply generally to legislation and regulation except for the intractable variety, and would borrow heavily from economic due process and fundamental liberties jurisprudence. In suits challenging the validity of restraints, the government would have the burden of persuading a court utilizing an intermediate standard of scrutiny, first, that the legislation serves important governmental objectives; second, that the restraint imposed by government is substantially related to achievement of these objectives, that is,... the fit between means and ends must be close; and third, that a similar result cannot be achieved by a less drastic means....
>
> Thus, a law prohibiting the exercise of a fundamental liberty is illegal unless it is necessary to achieve a compelling state interest.[91]

It should be noted that Siegan applies a double standard in this regard. With respect to property rights, he advocates

---

89 Economic Liberties and the Constitution, supra at 315-31.

90 198 U.S. at 57-58.

91 Economic Liberties and the Constitution, supra at 324.

judicial activism and little deference to Congressional intent, with the goal of expanding property rights. But with respect to individual liberties, his view is that the court's power should be constricted. In areas such as civil rights, religion and women's rights, he wants judges to conduct a limited and narrow review and to make decisions only based on the legislative intent of the 39th Congress (which passed the 14th Amendment) or the Second Congress (which passed the Bill of Rights);[92] this would result in a retreat from historic legislation and many of the landmark Supreme Court decisions protecting individual rights and liberties.

Siegan's proposed standard for review of economic legislation calls for a major change in constitutional law and rejects 50 years of Supreme Court precedent. The caseload of the 9th Circuit Court and other federal courts includes review of many statutes and regulations that protect against health, safety, and environmental dangers, that enable working people to be represented by unions, and that otherwise deal with economic regulation. Thus, Siegan would be faced with many cases for the applications of his peculiar views.

---

92 The Supreme Court's Constitution, supra at 89, 113, 135.

II. SIEGAN'S RECORD IS ONE OF INEXPERIENCE IN PRACTICAL LAWYERING SKILLS

All nominees to the federal bench should possess outstanding intellectual qualifications, legal skills and expertise. This is particularly true of nominees to the Courts of Appeals, since these courts make the final decisions in most cases decided in the federal court system. In Fiscal Year 1986, which ended on September 30, 1986, the federal Courts of Appeals disposed of 33,821 cases. Since the Supreme Court reviews only 100-150 federal appellate cases annually, nearly all Courts of Appeals decisions are final. Standards for appointment to the Courts of Appeals therefore should reflect the gravity and responsibility incumbent on final arbiters of legal interpretation. Siegan's background as a practicing attorney does not meet this standard.

After examining Siegan's entire legal career -- presumably both as a practitioner and a law professor -- the American Bar Association Standing Committee on the Judiciary gave him a "qualified" rating, the lowest "passing" grade.

Siegan's record as a practitioner is deficient. His responses to the Senate Judiciary Committee's Questionnaire for Judicial Nominees portray a legal career lacking distinction.[93] Out of 24 years in private law practice ending in 1971, he spent his last 21 years in a dual capacity as both a real estate developer and a real estate attorney. It is unclear how much

---

93 Bernard H. Siegan, responses to United States Senate Committee on the Judiciary Questionnaire for Judicial Nominees -- Questions Nos. 17-19 (undated) 12-21.

time he devoted to practicing law, as opposed to developing real estate. It also appears that much of the time he spent as a lawyer involved representing his personal real estate development interests, rather than representing others.

A federal appellate judge spends the vast majority of time reviewing cases decided by federal district courts. Although experience in the courtroom is not a requirement for an appellate judge, such experience is useful since it gives the jurist a practical framework to determine whether the lower court correctly applied the law. For this reason, Siegan's lack of courtroom experience is relevant.

At his hearing Siegan testified that he has never appeared in the Ninth Circuit or any of the district courts within that circuit. He stated he had appeared in federal court shortly after law school and characterized that appearance as "not to any significance."[94] Neither his Questionnaire nor his testimony indicated any familiarity with federal court procedures. In his Questionnaire, Siegan admitted that he appeared in court only "occasionally" and "almost all [his] experiences were in state courts."[95]

Siegan's state court experience is also limited. He has never had a jury trial. When asked to "describe the ten most significant litigated matters which [he] personally handled" in his 24 years of practice, Siegan listed one breach of contract

---

94 Tr. at 32.

95 Id.

case and nine real estate cases; in several of these Siegan was his own client.[96] None of his ten cases seems to be major or complex litigation of the type he would review as an appellate judge.[97]

In sum, Siegan's practical experience as a lawyer is minimal. Nor is this lack of experience counter-balanced by other qualifications such as outstanding scholarship.

III. CONCLUSION -- SIEGAN IS NOT QUALIFIED

A federal appeals court judge must possess outstanding intellectual qualifications, legal skills and expertise. A judge must respect the Bill of Rights, the Fourteenth Amendment's command for equal protection of the laws and due process, and principles that have guided our democracy for 200 years.

Siegan's contention at his confirmation hearing that his views are irrelevant to judicial decisionmaking may be well-intentioned, but it is misguided. As noted earlier, eminent constitutional scholars such as Charles Black have documented that philosophy shapes judicial behavior. No one can so completely divide opinion from action.

Some supporters of the nominee contend that Siegan should be confirmed because there is room for a diversity of views on the

---

96 Tr. at 34-39.

97 In only three of these cases does it seem that Siegan ever attended a hearing (Siegan only makes note of a hearing in cases nos. 1-3), and even in these, it appears that the hearings were more of the nature of motions, rather than court trials.

federal bench. Certainly there is room for diversity, but all federal judges must be believers in the basic framework for protecting rights in our constitutional system. Siegan has repudiated fundamental aspects of our constitutional system -- particularly portions of the Bill of Rights and the 14th Amendment -- that form the basis of American jurisprudence. Every citizen who brings a case before the court is entitled to judges who whatever their differences will grapple with tough contemporary issues within an accepted constitutional framework. Siegan does not meet this basic test. For these reasons, Bernard Siegan's nomination must be rejected.

Monroe Citizens for Public Education and Religious Liberty

MCPEARL

P.O. Box 10296
Rochester, NY 14610-0296

Martha Laties, Chairman
55 Dale Road East
Rochester, New York 14625
716-586-5036
February 29, 1988

Senator Patrick Leahy
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Leahy,

MCPEARL is a Monroe County, New York State, coalition working to keep public funds for public schools only and to oppose religious practices by public schools.

Please do not confirm Bernard Seigan as a judge for the Ninth Circuit Court of Appeals.

Mr. Seigan holds that the Fourteenth Amendment to the U.S. Constitution does not apply to the states the First Amendment clause banning government establishment of religion.

He thinks that states may constitutionally establish a religion.

The historical record, on the contrary, shows that Congress intended the Thirteenth and Fourteenth Amendments to apply the Bill of Rights to the states.

Mr. Seigan supports state-sponsored public-school prayer. In a 1987 book, The Supreme Court's Constitution, he said, "'Neutrality' in the classroom, it seems, requires, rather than rejects, some traditional religious input".

He rejects 40 years of U.S. Supreme Court decisions, dating back to Everson v Board of Education, 330 U.S. 1 (1947), which held that the Establishment Clause applies to the states and forbids state aid to religious activities or institutions.

Thank you.

Sincerely yours,

Martha Laties

Martha Laties

FIRST DISTRICT
DIVISION ONE

WILLIAM A. NEWSOM
JUSTICE
PERSONAL

STATE OF CALIFORNIA
Court of Appeal
STATE BUILDING—CIVIC CENTER
SAN FRANCISCO

February 29, 1988

Senate Judiciary Committee
United States Senate
Senate Office Building
Washington, D.C.

Ladies and Gentlemen:

I have been a member of the California Court of Appeal for ten years, and before that a Superior Court Judge in Placer County.

I am familiar with Professor Siegan's views on the subject of property rights. These views, as they would reasonably translate to judicial opinions on the crucial subject of land-use and related matters, strike me as not merely eccentric, but utterly at odds with settled Federal Constitutional principles.

For this among other reasons, including his lack of judicial experience, I am firmly opposed to Professor Siegan's nomination to the Ninth Circuit Court of Appeals.

Please enter my remarks in your record.

Very truly yours,

William A. Newsom

William A. Newsom

WAN:lc

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street · Austin, Texas 78705 · (512) 471-5151
Telecopier Number (512) 471-6988

March 1, 1988

The Honorable Joseph T. Biden, Jr.
United States Senate
Washington, D.C. 20510

The Honorable Strom Thurmond
United States Senate
Washington, D.C. 20510

Dear Senators Biden and Thurmond:

I am writing you in your capacities and Chairman and Ranking Minority Member of the Senate Judiciary Committee. I am unhappily aware that Senator Biden is presently recuperating from surgery, but I assume that his staff will see that the copy of the letter addressed to him gets to some appropriate person.

The purpose of this letter is to express my support for the nomination of Bernard H. Siegan for a seat on the Ninth Circuit. During Professor Siegan's years in teaching I have been generally familiar with his scholarly writings. Since 1985 he and I have served together as members of the Commission on the Bicentennial of the United States Constitution. From this acquaintance with him and his work, I thought he was very well qualified for a federal appellate judgeship and was pleased when his nomination to the Ninth Circuit was announced.

More recently I have gathered from the press that this nomination may be in trouble. Some of the things I have read made me wonder if they were about the Professor Siegan I know or if I could be mistaken in my impression that he is a bright and responsible scholar. To reassure myself on this I had our Law Library send me whatever they could find of his recent published writing. I read, or reread his book, THE SUPREME COURT'S CONSTITUTION (1987), and the following articles:

Keynote Address, 14 Envtl.L. 645 (1984);

Panel Discussion, 14 Envtl.L. 843, 857-862 (1984);

Economic Liberties and the Constitution: Protection at the State Level, 4 Cato J. 689 (1985);

Rehabilitating Lochner, 22 San Diego L.Rev. 453 (1985);

Constitution's Contracts Clause: Bulwark of American Individualism, L.A. Daily J., June 13, 1986, p. 4;

Commentary on Monahan Paper, 22 U.Brit.Colum.L.Rev. 165 (1987).

In addition, although I cannot say I reread it from cover to cover, I did get out Professor Siegan's best-known book, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980). I have read that book with care in the past and skimmed through it again to see if there was something shocking in it that I had forgotten.

In this writing I found what, from my acquaintance with Professor Siegan and his work, I had expected to find. His scholarship is careful and intellectually honest. He does not distort the historical record to support his own preconceptions. Indeed in his 1987 book, THE SUPREME COURT'S CONSTITUTION, at the end of the chapter on "Education and Preferential Treatment," at page 109, he makes the interesting comment: "these examples suggest that an emphasis on original meaning is not necessarily beneficial to any particular position in current affirmative action controversies."

I think that the sentence I have quoted is a fair description of Professor Siegan's work generally. He is committed to the view that the rule of law requires that the Constitution, like any other legal document, be interpreted in terms of its original understanding. "[T]hose who demand change must observe the constitutional mandate for amendment." Id. at xi.

The role of original understanding is, as it has always been, one of the most vexing issues in constitutional law. Classic statements of contrasting positions on that issue were put forward in the majority and dissenting opinions in Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934). To Justice Sutherland, for the dissenters:

> A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time. * * * This view, at once so rational in its application to the written word, and so necessary to the stability of constitutional principles, though from time to time challenged, has never, unless recently, been put within the realm of doubt by the decisions of this court.

290 U.S. at 448-449. A quite different view was stated by Chief Justice Hughes, writing for the majority:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the

> vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: "We must never forget, that it is a constitution we are expounding" (McCulloch v. Maryland, 4 Wheat. 316, 407); "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Id. page 415 of 4 Wheat.

290 U.S. at 442-443.

It is plain that Professor Siegan's approach resembles that of Justice Sutherland more than it does that of Chief Justice Hughes. That approach is not fashionable today. Indeed there are constitutional scholars today who regard original understanding as irrelevant. Even though I would not give the conclusive weight to original understanding that Professor Siegan does, I think that his approach is one that has support both in logic and tradition and that surely ought not be regarded as disqualifying for a judgeship. His historical research has been of great value even to scholars like me who think history is important, but not conclusive, in constitutional interpretation.

I would be concerned if I thought that Professor Siegan was using his emphasis on original understanding as a mask to hide an attempt to send blacks back to the ghetto and women back to the kitchen. I was certain from knowing him that this was not the case, and reading his writing confirms my feeling on this. Of the things I have read or reread in the last few days, only the 1987 book gets into issues of this kind. He is explicit that by 1954 "government sanctioned segregation harmed and demeaned [blacks] and the American society" (p. 99). He goes on to declare that "such segregation is totally repugnant in modern society" (P. 106) and to spell out the rationale that he thinks supports the result in Brown v. Board of Education (p. 107). He explicitly approves the intermediate standard of scrutiny by which the Supreme Court has struck down laws that discriminate in terms of sex (p. 147).

Professor Siegan does not hide the fact that he disagrees with some well-known decisions of the Supreme Court. These include those holding that the Establishment Clause applies to the states (p. 130), those in the abortion area (p. 161), and those putting constitutional restrictions on actions for libel and slander (p. 176). His views about these decisions are surely

debatable, but they are views held by members of the Supreme Court and cannot be regarded as outside the permissible bounds of differences of view among persons devoted to the Constitution.

It is worth remembering that Professor Siegan has been nominated to sit on an intermediate appellate court. The late Judge Learned Hand was fond of remarking, in a wonderful bilingual pun, that he and his colleagues on the Second Circuit was "puisne judges." Judge Thomas Gibbs Gee, of the Fifth Circuit, has stated the only proper course for a judge of such a court who is asked to follow a Supreme Court decision that he thinks "gravely mistaken" and "profoundly wrong." He said: "Subordinate magistrates such as I must either obey the orders of higher authority or yield up their posts to those who will." Weber v. Kaiser Aluminum & Chemical Corp., 611 F.2d 132, 133 (5th Cir. 1980). I have not the slightest doubt that if, as I hope, he is confirmed, Bernard Siegan, as a judge of the Ninth Circuit, will apply the Constitution as it has been interpreted by the Supreme Court rather than as he might himself have interpreted it.

Sincerely yours,

Charles Alan Wright

March 3, 1988

Honorable Senator Joseph Biden
Chairman, U.S. Senate Judiciary Committee
224 Dirkson Building
Washington, DC 20510

Dear Senator Biden:

As the Legislation Chair of the California Federation of Business and Professional Women, Greater South Bay Chapter, I am enclosing a Board Resolution on behalf of my organization which opposes the confirmation of Bernard Siegan for appointment to the U.S. Court of Appeal for the 9th Circuit.

BPW is a nonprofit, nonpartisan organization committed to political and economic equity for women. Our objectives are to elevate the standards for women in businesses and professions.

We urge your rejection of the nomination of Professor Siegan to the bench.

Very truly yours,

Cecelia P. Kapitan

CECELIA P. KAPITAN
Legislation Chair
BPW Greater South Bay Area

cc: Senator Dennis DeConcini w/enclosure
Senator Orrin Hatch w/enclosure
Senator Gordon Humphry w/enclosure
Senator Patrick Leahy w/enclosure
Senator Paul Simon w/enclosure
Senator Arlen Spector w/enclosure
Senator Robert Byrd w/enclosure
Senator Charles Grassley w/enclosure
Senator Howell Heflin w/enclosure
Senator Edward Kennedy w/enclosure
Senator Howard Metzenbaum w/enclosure
Senator Alan Simpson w/enclosure
Senator Strom Thurmond w/enclosure
Senator Alan Cranston w/enclosure
Senator Pete Wilson w/enclosure

BOARD RESOLUTION

Business and Professional Women

Greater South Bay Area

WHEREAS, the Judiciary Committee is considering Professor Bernard Siegan for appointment to the U.S. Court of Appeals for the 9th Circuit.

WHEREAS, the Business and Professional Women (BPW) of Greater South Bay is a nonpartisan, nonprofit organization committed to political and economic equity for women, more particularly working women.

WHEREAS, the members of BPW are comprised of forty (40) concerned citizens of the United States.

WHEREAS, Bernard Siegan's philosophy and interpretations of the United States Constitution may conflict with our efforts to eliminate discrimination against women and minorities.

WHEREAS, a judge's philosophy and decisions will directly affect the lives of those of us residing in the jurisdiction of this particular lower court.

NOW THEREFORE, it is resolved that BPW of Greater South Bay Area does not support the appointment of Bernard Siegan to the bench for the U.S. Court of Appeals for the 9th Circuit and will work diligently to urge opposition to a Senate confirmation of the appointment.

On this 3rd day of March, 1988, we, the Business and Professional Women of the Greater South Bay Area, pass this Board Resolution.

By: _____
President

By: _____
Legislation Chairman

EARL B. GILLIAM BAR ASSOCIATION OF SAN DIEGO COUNTY

P.O. Box 1262
San Diego, California 92112
(619) 239-5091

Office of the President

OFFICERS

BARBARA L. DAVIS
President
THOMAS L. GAYTON
President-Elect
REGINA DILLARD
Secretary
RANDA TRAPP
Treasurer
DANIEL WEBER
Historian
MARY A. FRANKLIN
Parliamentarian

BOARD MEMBERS

KATHY PAYNE
GREG MCCLAIN
PATRICIA A. McQUARTER

PAST PRESIDENTS

HON. ELIZABETH RIGGS
HON. NAPOLEON JONES, JR.
LELROY RICHARDSON
HON. JOSEPH K. DAVIS
OTIS JONES
DENNIS W. DAWSON
KEITH BURT
DANIEL WEBER
ROBERT M. BENNETT
MARY A. FRANKLIN

March 3, 1988

Senator Joseph Biden, Chairman
Senate Judiciary Committee
224 Dirksen
Washington, D.C. 20510

Dear Senator Biden,

The membership of the Earl B. Gilliam Bar Association of San Diego County, which is the local association of black attorneys, has passed a resolution opposing confirmation of Bernard Siegan to the Ninth Circuit Court of Appeals.

We find his views on the Constitution to be repugnant to prevailing historical interpretation. This is particularly true of his view on the Fourteenth Amendment as it applies to blacks, women and other minorities.

We believe that Mr. Siegan is an ideological activist who would seek to promote the economic interest of a few over the general welfare of many.

Sincerely,

Barbara L. Davis

Barbara L. Davis,
President

Coalitions for America

Paul M. Weyrich
National Chairman
Curt Anderson
President
Library Court
Connaught Marshner
Stanton Group
Henry L. Walther
721 Group
Patrick B. McGuigan
Carroll Group
Angela Grimm
Jewish/Conservative Alliance
Sam Kane
Resistance Support Alliance
Charles A. Moser

721 Second Street, NE
Capitol Hill
Washington, DC 20002
(202) 546-3003

March 8, 1988

Senator Joseph Biden
U.S. Senate
Washington, D.C. 20510

Dear Senator Biden:

We have watched with increasing dismay the efforts of liberal special interest groups to exercise veto power over the selection, nomination and confirmation of judicial nominees. The Judiciary Committee, under your chairmanship, now seems determined to heed those who define principled conservative nominees as "controversial".

We are writing to express strong support for the confirmation of Professor Bernard Siegan, President Reagan's excellent nominee to the Ninth U.S. Circuit Court of Appeals. Professor Siegan's distinguished service to the rule of law as a scholar, and his service to the nation as a member of the Constitution Bicentennial Commission -- these deserve a better reward than continued pandering to those who reject the historic separation of powers provided for in the Constitution.

We hope you will rise to this occasion and support Professor Siegan's confirmation.

Sincerely,

Patrick B McGuigan

Jerry C. Nemer

Raymond J. LaJeunesse, Jr.

William A. Keiry

Jeffery O. Smith

names and organizations of those signing letter supporting Professor Siegan:

Patrick B. McGuigan
Legal Affairs Analyst
Coalitions for America

Raymond J. LaJeunesse, Jr.
National Right to Work Foundation

William H. Kling
News Director
Free Congress Political Action
Committee

Jeffery D. Troutt, Director
Judicial Reform Project
Institute for Government & Politics

Jeffrey Eisenach
The Washington Policy Group

Jerry C. Nims
The Moral Majority

Daniel Casey
Executive Director
American Conservative Union

Peter Waldron
Contact America

Grover Norquist, Exec. Director
Americans for Tax Reform

respond to: Coalitions for America
721 Second Street, N.E.
Washington, D.C. 20002

titles and organizations for purposes of identification, does not necessarily constitute organizational endorsements.

CWL
CALIFORNIA
WOMEN
LAWYERS

Executive Office
926 J Street, Suite 714
Sacramento, CA 95814
916 441-3705

Board of Governors

President
Pauline Weaver
Fremont

First Vice President
Janice Kamenir-Reznik
Encino

Second Vice President
Judith Kleinberg
Palo Alto

Secretary
Margaret Bomberg
Chico

Treasurer
Cynthia Ludvigsen
San Bernardino

Immediate Past President
Patricia Shiu
San Francisco

Executive Director
Katy Sorenson
Sacramento

Barbara Bryant
Oakland

Tami Buscho
Sacramento

Marjorie Carter
Newport Beach

Doris Coleman
Fresno

Ellen DeShazer
Los Angeles

Susan Finlay
Coronado

Kathy Gillespie
San Francisco

Jewell Jones
San Pedro

Elizabeth Kaufman
Northridge

Kathleen Lammers
San Francisco

Lorraine Loder
Los Angeles

Barbara Mallach
Redwood City

Denise McGuire
La Jolla

Kelly O'Brien
Hidden Hills

Barbara O'Hearn
San Francisco

Zo Taylor Rees
Tucumpa

Susan Schwartz
Los Angeles

Belinda Stith
Los Angeles

Beverly Tucker
San Francisco

Deborah Vollmer
Bakersfield

Marilyn Wiczynski
Hawthorne

Karen Worth
San Rafael

Barbara Zuniga
Walnut Creek

from the office of

PAULINE WEAVER

March 8, 1988

Senator Joseph Biden
Dirksen Building, Room 221
Washington D.C. 20510

RE: BERNARD SIEGAN NOMINATION-U.S. DISTRICT COURT OF APPEAL
NINTH CIRCUIT

Dear Senator Biden:

California Women Lawyers opposes the confirmation of Bernard Siegan to the U. S. Court of Appeals for the Ninth Circuit based on his extraordinary lack of trial and law practice over a 21 year period, his consistent disregard of social, minority and environmental issues as reflected by his own body of work, and his track record of too often being out of step with mainstream thinking and the majority of legal scholars in his judicial philosophy and his views on constitutional doctrines.

Seigan's belief that he can ignore his own philosophy is unconvincing. His long term and continued criticisms of Supreme Court precendents is based on his belief that broad terms like equal protection should be interpreted according to the intent of the framers rather than the accepted view that these terms were intentionally left undefined to allow for changes which were certain to occur. His own writings using his approach would unravel progress made in the areas of religion, minority rights, discrimination, politics, voting, labor and employment rights. He calls the Court's decisions barring gender discrimination "morally objectionable." He believes that Nixon should have been able to stop the publication of the Pentagon Papers.

Siegan changes his tune when it comes to legislation interfering with the "natural right" of individuals to do as they wish with their real property. Here, he says, the court should closely scrutinize legislation that affects rights of property owners. At least here he is right in step with one group--other real estate developers.

AFFILIATES: Black Women Lawyers Association of Los Angeles; Committee on Women Lawyers, Santa Clara County Bar; Fresno County Women Lawyers; Inland Counties Women at Law; Kern County Women Lawyers; Lawyers Club of San Diego; Los Angeles Lesbians in Law; Marin County Women Lawyers; Monterey County Women Lawyers; Napa County Women Lawyers; Orange County Women Lawyers; Queen's Bench; San Fernando Valley Women Lawyers; San Francisco Women Lawyers Alliance; Solano County Women Lawyers; Sonoma County Women in Law; South Bay Women Lawyers; Women Lawyers Association of San Luis Obispo County; Women Lawyers of Alameda County; Women Lawyers of Long Beach; Women Lawyers of Sacramento; Women Lawyers of Santa Cruz County; Women Lawyers of Ventura County; Women Lawyers' Association of Los Angeles; Women's Section, Contra Costa County Bar; Women's Section, San Mateo County Bar

Siegan's law practice is narrow and appears to be, at most, part time. According to him, almost all of his cases were in state courts.

In view of the above, it is unclear why this person is even being considered, but it is very clear that he is not qualified and should not be confirmed.

Very truly yours,

Pauline Weaver

Pauline Weaver
President

National Organization for Women, Inc.
1401 New York Avenue, N.W., Suite 800 • Washington, D.C. 20005-2102 • (202) 347-2279

March 10, 1988

Senator Patrick J. Leahy
433 Russell Office Building
Washington, DC 20510-4502

Dear Senator Leahy,

The Senate Judiciary Committee has received a report in which the National Organization for Women joined 32 other organizations in detailing our joint opposition to the nomination of Bernard Siegan for a judgeship on the U.S. Court of Appeals for the 9th Circuit.

After witnessing Mr. Siegan's performance at his February 25, 1988, confirmation hearing before the Committee, NOW is even more alarmed at his nomination to this important judicial seat.

As you know, the Alliance for Justice report cited numerous grounds on which the 32 cooperating organizations oppose the appointment of Mr. Siegan to the federal appeals court. As the nation's largest feminist organization, NOW must emphasize Mr. Siegan's hostility to the enforcement of anti-discrimination laws.

We sincerely hope that you are as troubled as we by Mr. Siegan's publicly stated position that "Title VII joins the long list of government programs whose principal accomplishment is the imposition of higher prices and the acceleration of inflation." (Failure of Anti-Discrimination, Orange County Register, January 25, 1979.)

At the same time, we are not persuaded by Mr. Siegan's "confirmation conversion" in which he told the Committee that he would "do what is required" and support recently established judicial precedent as it relates to the interpretation of the 14th Amendment. You will recall that Mr. Siegan admitted that he had never before expressed this new viewpoint for him, either in writing or in speaking.

On the other hand, viewpoints which he has held for many years include:

- The states and the federal government may pass laws which discriminate against women in education, jury service, voting and holding office because the Constitution only protects "natural rights such as life and liberty," not "political" rights.

- Court decisions barring gender discrimination are morally objectionable because of the Court's dubious authority in this area.

- The Constitution contains only minimal protections for individual rights, which causes him to object to the line of cases that establish a personal right of privacy, as expressed in Roe v. Wade.

- Economic rights should be given precedence over individual rights. Therefore, laws such as those establishing a minimum wage, regulating child labor and safe work environments, and protecting the environment are intrusions on the rights of business owners.

- While the federal government is forbidden to establish a religion, the states are free to do so.

- While the First Amendment says Congress may make no law abridging free speech, the President and the courts are not prohibited from doing so.

- Brown v. Board of Education was wrongly decided under the 14th Amendment. The real justification was the right to travel since black children have the right to travel to schools attended by white children.

As was the case with Judge Bork, such regressive and, frankly, offensive views might be acceptable in a law school classroom to provoke discussion, but in a federal appeals court judge they are intolerable.

With the exception of the one example of "confirmation conversion" cited above, the Judiciary Committee hearings revealed that Mr. Siegan continues to hold his extreme views. Futhermore, to elevate him to a position as important as the appellate court would be to enhance his qualifications and credentials as a judge. I'm certain none of us will ever forget the effort it took to rebut the presumption that Judge Bork was worthy of a seat on the U.S. Supreme Court.

The National Organization for Women strongly urges you to reject the nomination of Bernard Siegan to the U.S. Court of Appeals for the 9th Circuit.

Sincerely,

Molly Yard
President

MY/ms

ALAN CRANSTON
CALIFORNIA

United States Senate

WASHINGTON, DC 20510

March 15, 1988

Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman,

As Senators representing states within the jurisdiction of the Ninth Circuit, we are writing to express our concerns about the nomination of Bernard H. Siegan to the Court of Appeals for the Ninth Circuit. We believe that Mr. Siegan's extreme theories of constitutional law, as well as his minimal legal experience, make him unsuitable for this important life tenure position.

The Judiciary Committee's hearings on the nomination to date have delved into Mr. Siegan's extraordinary legal views on a wide range of issues. As you know, he has written extensively on the Constitution and individual rights and liberties, expressing views at sharp variance with settled positions and landmark cases in numerous areas of the law. He has argued that the Fourteenth Amendment does not protect citizens in areas he calls political rights, for example, voting, jury service, or access to public education. He has contended that the Establishment Clause of the First Amendment does not apply to the states. He has challenged Supreme Court decisions guaranteeing freedom of the press and forbidding sex discrimination.

In contrast to his constricted view of the Constitution in securing individual rights and liberties, he has consistently advocated an expansive role in protecting so-called economic rights. He espouses legal theories which would overturn, as an unconstitutional invasion of property rights, legislation establishing minimum wage laws or protecting health and safety. His position has long ago been repudiated by the Supreme Court.

During his confirmation hearings, Mr. Siegan repeatedly sought to diminish the importance of his controversial and frequently bizarre writings on the meaning of various provisions of the Constitution. His contention that his views of constitutional law are totally irrelevant to the work of a U.S. Circuit Judge who would be bound by Supreme Court precedents indicates a

fundamental misconception of the nature of the work of the Ninth Circuit. Lower federal courts are constantly faced with issues which do not fall clearly within established precedents. In fact, as former Ninth Circuit Judge Shirley Hufstedler stated in her letter to the Committee expressing opposition to the Siegan nomination,

> "Very few cases in the Ninth Circuit can be resolved by finding a similar set of facts in a Supreme Court case and following the holding in that case. The bulk of the docket is made up of cases presenting far more vexing problems, requiring the application of legal principles drawn from many cases, none of which presents the same factual picture or the identical issue upon which the Supreme Court has spoken."

As a member of 3-judge panels, Mr. Siegan would cast the decisive vote in case-after-case. Since the Supreme Court reviews only a tiny percent of the decisions of the Courts of Appeals, these decisions would be final adjudications in the vast majority of cases. Mr. Siegan's extreme judicial philosophy is hence very relevant to his qualifications to serve on the Ninth Circuit.

Moreover, Mr. Siegan's legal experience is minimal, at best. He has never been admitted to practice in any federal appellate court and has virtually no experience in federal litigation. His prior experience as a real estate attorney and developer indicate very limited, if any, exposure as a practicing attorney to the issues which arise in a federal courtroom.

The 37 million people who live within the states which comprise the Ninth Circuit are entitled to have their cases reviewed by highly qualified judges who understand and accept our basic constitutional framework, including the role of the courts in protecting individual rights and liberties. Bernard Siegan does not satisfy these fundamental qualifications.

Sincerely,

Spark M. Matsunaga

Alan Cranston

Brock Adams

3401 North Fairfax Drive
Arlington, Virginia 22201-4498

School of Law
Office of the Dean

George Mason University

March 15, 1988

The Honorable Joseph Biden
Chairman Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Senator Biden:

I am offering this statement in support of the confirmation of Professor Bernard H. Siegan to be a judge on the U. S. Court of Appeals for the Ninth Circuit. I am the Dean of the School of Law of George Mason University in Arlington, Virginia, and I have been a law professor for over 31 years. In my professional capacity I first became acquainted with Professor Siegan after he left practice and entered law teaching. I have had many occasions over the ensuing nearly 20 years to become thoroughly acquainted with Professor Siegan's style, his character, and his professional ability. I might add that during my entire professional career I have specialized in the interface of law and economics, an area of endeavor which Professor Siegan has also emphasized.

I do not know of a single person in all of law teaching more universally respected and liked by his colleagues than is Professor Siegan. Not only do his colleagues recognize his academic and professional skills, but they all know him to be one of the most decent human beings they have ever met. It would be hard to imagine any individual with a personality and character more appropriate for a judicial role than that of Bernard Siegan. He is temperate, sympathetic, understanding and open-minded to any well-developed position. Professor Siegan's characteristics even at this point seem in all respects like the very model of what we should want in a federal judge.

I believe, however, that I am especially well qualified to address a much more significant issue surrounding this particular judicial nomination. Professor Siegan has written books and scholarly articles that have frequently challenged comfortable, indeed ingrained, beliefs about important areas of law. He first came to considerable academic prominence when he published his book on zoning in Houston, Texas. The Committee may be aware that Houston is the only major city in the

United States that does not have a comprehensive zoning plan. Siegan's work was an extraordinarily careful and rigorous evaluation of the costs of housing in Houston as compared to cities with more traditional land-use plans.

When he found, perhaps to his own surprise, that the net effect of zoning in the other cities was to raise the cost of housing for low-income citizens, this conclusion was met with great consternation by those whose whole livelihood was wrapped up in the prevailing approach. A number of economists and lawyers have looked at this subject since Professor Siegan's pathbreaking work. While some have certainly disagreed with his results, none has seriously damaged the significance of his findings - or the importance of this kind of investigation. Unfortunately there has also been no abatement of the hostility of those whose own self interest (and academics do have self interests) was attacked by his findings.

The members of this Committee certainly know academic debates are often as rancorous, as emotional, and as unenlightening as are political ones. Yet that is part of the process of academic development in legal areas. But we must keep our eye on the ball; the academic quality of good work has nothing to do with the political or ideological thrust of conclusions. Scholarship and honesty are the touchstones. No one has ever been known to suggest that Professor Siegan had anything but the purest scholarly motives in his research, and every scholar in the field, whether he agrees with his final conclusions or not, respects Professor Siegan for that characteristic.

Now obviously it is not the job of this committee to resolve the bottom line of an academic debate on the cost of zoning. I raise this to illustrate two matters, 1) a great deal of opposition to certain academics is based on individual or political self-interest and bias and 2) that Professor Siegan enjoys a reputation for disinterested scholarship that even a judge would be proud to have associated with his name.

Professor Siegan's early work on zoning was eclipsed in later years by his enormously important, provocative, and scholarly book on constitutional law. Again he did not hesitate to challenge the accepted explanations when his own research led him to the conclusion that the prevailing views might be in error. This time, however, the subject areas he dealt with raised a more emotional response than did the matter of urban planning. For this time he dealt with the whole issue of constitutional protection of property rights in the American legal system. As his theory began to develop in his own mind, it must have taken an extraordinary amount of courage to elaborate it for

popular and academic consumption and debate. Nonetheless, no one who knows Professor Siegan would for a moment suggest that he would in any way vary his conclusions for political or popular ends.

In constitutional law, as in other areas of legal scholarship, there is usually a single prevailing paradigm. Few academics will be found who have the intellectual or moral courage to buck standard positions assumed by the best known people in a field. Academic advancement and an improvement of our knowledge of law and society is not made by the mass of professors. It is only made by those who demonstrate the courage of their convictions and whose convictions are a result of a solemn dedication to honest scholarship. So, while Professor Siegan's constitutional law work has not been or not yet become part of the mainstream, it is fair to say that no great scholarship is ever part of the mainstream. Great scholarship creates paradigms; it does not follow along the well-beaten tracks laid down by others. In the sciences, such advances are frequently rewarded with Nobel Prizes and other honors. In the far more emotional world of law and policy subjects, comparable advances are more frequently met with criticism by threatened and insecure people. Thus innovative scholarship in social areas is far less common than it is in the hard sciences, and it takes a certain kind of brave soul even to engage in the process.

Clearly, the question before this committee now is whether it wishes to encourage or discourage honest scholarship that may disturb the status quo. Again, there is no point in suggesting that this committee should resolve difficult issues of constitutional history and theory. The only point is whether this committee will allow disagreement with some of the results of honest scholarship to become a relevant consideration in the confirmation of a federal judge.

To my mind political integrity demands that only really relevant considerations, such as integrity, technical skill, intellect and character be examined in a confirmation hearing. It is hard to imagine a more dangerous blow to the fragile body of honest scholarship than a refusal to confirm a law professor because of purely political disagreement with his academic conclusions. This would be tantamount to book burning of the worst sort. It certainly behooves this Committee to take into consideration the impact on academic freedom in American law of a denial of Siegan's confirmation. The committee should abjure any suggestion that America'a law professors are somehow a suspect category that should be subject to a special political test for judicial confirmations. Some of the most distinguished judges America has ever produced began their significant legal careers as academic lawyers. If the Committee is interested in maintaining this fine tradition in the American judiciary, it is absolutely essential that it not threaten in any degree the academic integrity of professors who might at some later point in their careers

aspire to a judicial position. Intellectual and academic integrity are scarce and delicate commodities. Few professors have the stomach or skills for engaging in a political battle over their serious scholarship in an entirely unfamiliar and unsympathetic arena. So not only is it important to keep open the possibility of having judicial appointments made from academia, it is even more essential that the academic integrity of these same individuals be considered in the process.

I thank the Committee for giving me this opportunity to submit my statement. I regret that I was not able to appear personally because of a prior commitment to an educational program for federal judges. I might add that this educational program would not be possible but for the courageous work of earlier scholars, many of whom were outside the mainstream when they did their most important work.

Sincerely,

Henry G. Manne
Dean, School of Law
Director, Law & Economics Center

HGM:dcd
cc: Senator Strom Thurmond

2383 W. MARLTON PIKE CHERRY HILL, NEW JERSEY 08002 609/665-6100

J C R C
OF SOUTHERN NEW JERSEY

JEWISH FEDERATION OF SOUTHERN NEW JERSEY

President
Dr. Jeffrey Sorokin

Vice Presidents
Deborah Davis, Esq.
Maxine Ladov
Dr. Alan Weinstein

Secretary
Sibyl Gass

Executive Director
Alan Respler, A.C.S.W.

March 17, 1988

Hon. Patrick J. Leahy
United States Senate
Washington, DC 20510

Dear Senator Leahy:

The Jewish Community Relations Council of Southern New Jersey has, as its constituents, the 60 Jewish religious, social welfare and fraternal organizations of Southern New Jersey.

On behalf of our constituents, we express our opposition to the confirmation of Bernard Siegan to the U.S. Ninth Circuit Court of Appeals. We are deeply concerned that the constitutional views that he has expressed are so far to the extreme to be beyond the accepted contemporary constitutional thought. It is our understanding that his views are counter to basic legal principles that have long been established under our Bill of Rights and the 14th Amendment's mandate for equal protection under the law.

We respectfully urge that this nomination be rejected.

Sincerely yours,

Jeffrey Sorokin

Jeffrey Sorokin, M.D.
President

Alan Respler

Alan Respler
Executive Director

AR:dr

SOUTHWESTERN
75
UNIVERSITY
SCHOOL OF LAW
1911□1986

March 18, 1988

Hon. Joseph Biden
United States Senate
224 Senate Dirksen Office Building
Washington, D.C. 20510

Attn: Steve Metalitz

Re: Bernard Siegan

Dear Senator Biden:

I am writing on behalf of the nomination of Bernard Siegan to sit on the Ninth Circuit Court of Appels. One of the strengths of the unelected federal judiciary is that the men and women who serve on it come from a variety of backgrounds. These judges represent the spectrum of Americans, liberal, conservative, and libertarian. They swear to uphold the Constitution, and there is every reason to believe that they work hard to do just that. There is room on the bench for respected liberals as Abner Mikva and Leon Higginbotham, for respected conservatives as Laurence Silberman and Patrick Higginbotham, and for respected libertarian-conservatives as Frank Easterbrook and Richard Posner.

Bernard Siegan would be an outstanding addition to the bench. His writings show him to be a rigorously analytical scholar. He is deeply committed to individual liberty under the Constitution. He does not prejudge, but decides on the basis of the evidence he uncovers in his work. Professor Siegan's inquisitive mind and his unbiased method of analyzing problems demonstrate that he has the temperament to be an outstanding, fair, and compassionate judge.

I realize that there is currently underway a campaign of pressure by a small vocal lobby to block Professor Siegan's confirmation. These self-appointed guardians of the ideological purity of the judiciary derive their position not from a careful study of constitutional principles and a respect for the American way of tolerance for free speech, but from their money gained from the production of Hollywood situation comedies. They distort and deride Professor Siegan's thoughtful analytical scholarship. As a professor, Bernard Siegan is expected to exercise intellectual curiosity. But Professor Siegan knows that the role of judging requires one to apply the law as given rather than as one would like it to be. For example, as a professor in a classroom discussion, I might strongly criticize current decisions or policies in corporation law, securities regulation, and constitutional law (my main areas of study). But on an examination, I judge my students according to their knowledge

675 South Westmoreland Avenue Los Angeles, California 90005-3992 (213) 738-6700

SOUTHWESTERN
75
UNIVERSITY
SCHOOL OF LAW
1911□1986

of what the law is, not what I think it ought to be. Likewise, Professor Siegan's temperament and his powerful faith in the liberty of the individual assure that he will decide cases in accordance with the law as it is, not as it might have been.

I strongly urge you to approve the nomination of an outstanding American scholar, Professor Bernard Siegan, to become a judge on the U.S. Court of Appeals for the Ninth Circuit.

Sincerely,

Joerg W. Knipprath

JOERG W. KNIPPRATH
Associate Professor of Law

675 South Westmoreland Avenue Los Angeles, California 90005-3992 (213) 738-6700

HARVEY
MUDD
COLLEGE
CLAREMONT,
CALIFORNIA
91711

DEPARTMENT
OF
HUMANITIES
AND
SOCIAL SCIENCES

714-621-8022

21 March 1988

The Honorable Joseph Biden
Chairman, Senate Judiciary Committee
United States Senate
Washington, District of Columbia 20510

Dear Senator Biden:

Permit me to encourage your approval of the nomination of Bernard Siegan as a member of the federal judiciary. I address myself to you in the character of a colleague of Professor Siegan and one who has particularly enjoyed his graciousness and careful scholarship.

It will not do for me to praise what is so evident to everyone, namely Bernard Siegan's gentlemanliness. Nevertheless, it would not be amiss to signal the relation between his character and his scholarship. I have sat with him before his students, only to marvel at the gentle leadership he offered them. For him, a conversation resonates with all the expectations of openness and seriousness of purpose that is classically associated with that term. He is thoughtful, meticulous, and generous in discussion, virtues which I would imagine to be of prime significance in a judge.

I might also speak of his broad grasp of the Constitution and laws of the United States, but that I am sure you have his works spread out before you and have already surmised that his scholarship is impeccable. Do not fail to note, however, the manner in which he gives full scope to every interpretation. I believe that that is rather a matter of temperament than of affectation -- a temperament no less desirable in a judge than in a legal scholar.

Professor Siegan does not know that I have written this letter. I have seen reports of his nomination pending before your committee and regard it as only fitting that I should share with you my experiences with him. I will send him a copy, that he may realize that the qualifications which must have secured him the nomination in the first place are manifest to them that have watched him at work. I thank you kindly for your attention.

Most sincerely,

William B. Allen
Professor of Government

cc: Prof. Bernard Siegan

RCAR
RELIGIOUS COALITION FOR ABORTION RIGHTS
100 Maryland Avenue N.E. · Suite 307 · Washington, DC 20002 · (202) 543-7032

March 21, 1988

MEMBERS

The Honorable Patrick Leahy
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

The Religious Coalition for Abortion Rights, a coalition of 31 national Protestant, Jewish and other pro-choice religious organizations, has voted to oppose the nomination of Bernard Siegan to the Ninth U.S. Circuit Court of Appeals. Although RCAR traditionally does not take positions in support of or opposition to judicial nominees, we feel that Mr. Siegan's views on settled constitutional issues are so extreme that action on our part is warranted. As you may know, RCAR did not formally oppose any of the other recent controversial nominees, including Daniel Manion and Robert Bork.

Harvard law professor Laurence H. Tribe, who testified before the Judiciary Committee in support of the nomination of Justice Anthony M. Kennedy, wrote that Mr. Siegan is "unfit to serve as a federal judge." Professor Tribe also wrote that the thrust of Siegan's writings "is to reduce the equality principle of the Civil War Amendments to a pale shadow of what the authors and ratifiers intended, what the language plainly mandates, and what the past fifty years of federal decisions confirms." Even former Judge Robert Bork called some of Siegan's judicial philosophy "a radical alteration in our constitutional arrangements" that would bring about "a massive shift away from democracy and toward judicial rule." Mr. Siegan is not an apostle of judicial restraint but a judicial activist who has expressed serious doubts about the competence of legislatures.

Specifically, we are concerned by Mr. Siegan's rejection of the entire line of privacy rights cases, including Roe v. Wade, and the minimum deference he would grant to the constitutionality of privacy rights. His apparent insensitivity to the rights of individuals to privacy outside the sphere of economic activity is shocking in light of decades of constitutional evolution and growth.

Furthermore, Mr. Siegan's belief that the Fourteenth Amendment does not extend the Establishment Clause to the states is unjustifiable given the direction of Supreme Court precedent for more than 40 years. The separation of church and state, which we believe is a fundamental principle of our constitutional democracy, could be severely threatened by Mr. Siegan, should he be confirmed. His interpretation of the First Amendment could permit establishment of state religious, state-sponsored school prayer, and direct aid to religious schools. Both Congress and the Supreme Court have rejected these as impermissible intrusions on church-state separation.

Our nation's circuit courts play a vital role as the final arbiter in the overwhelming majority of cases that arise. The Ninth Circuit has the final word on virtually all of the 5,000 cases decided by that Circuit each year. Only a handful of cases are ever reviewed by the Supreme Court. The Senate's role in the judicial nomination process is co-equal to that of the President, and nominees for judicial positions with life tenure should properly be judged with the same scrutiny as recent nominees to the Supreme Court.

While Mr. Siegan has contended that he would ignore his personal views and apply Supreme Court precedents to cases, reality suggests that judges have great leeway in applying precedent. Judges are particularly free to apply personal preferences in cases in which there is no clear or binding precedent. A position on the Ninth Circuit should not be given to any individual who has made a career out of criticizing the mainstream of judicial philosophy, legislatures, and many areas of settled constitutional law. In addition, many legal experts feel that Mr. Siegan is unqualified for lifetime service on such an important federal court.

The Religious Coalition for Abortion Rights joins a long list of religious, civil rights, environmental, labor, and civil liberties organizations, in formally opposing the nomination of Bernard Siegan to the Ninth Circuit. For the reasons stated above, which deal directly with our mission, and for reasons enumerated in the report on Mr. Siegan which we and several of our member faith groups have joined, we urge you to reject the nomination in the Judiciary Committee, and not to report the nomination to the full Senate.

Thank you for your consideration.

Sincerely yours,

Faith Evans

Mr. Faith Evans
President

FE/jyc

LORD, DAY & LORD
25 BROADWAY
NEW YORK, N.Y. 10004

1050 CONNECTICUT AVENUE, N.W.
SUITE 500
WASHINGTON, D.C. 20036
TELEPHONE: (202) 429-0504
CABLE: LORDATTY, WASHINGTON, D.C.
TELEX: 248228 HODC UR (RCA)
TELECOPIER: (202) 429-0977

TELEPHONE: (212) 344-8480
CABLE: LORDATTY, NEW YORK
TELEX: 62588 (WU)
12-8810 (WU)
TELECOPIER: (212) 767-0031
(212) 767-1677

1 FREDERICK'S PLACE
LONDON EC2R 8AB
TELEPHONE: (01) 726-4451
CABLE: LORDATTY, LONDON EC2
TELEX: 291629 LORDAY G
GP 2/3 TELECOPIER: (01) 726-8559

March 23, 1988

Hon. Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Biden:

The Judiciary Committee has under consideration the confirmation of the appointment of Professor Bernard Siegan of the University of San Diego School of Law to the United States Court of Appeals for the Ninth Circuit. I am writing to urge the Committee to confirm the nomination because I believe that Professor Siegan is highly qualified for this judicial position.

I have known Professor Siegan for several years, especially in connection with our membership on the Commission on the Bicentennial of the United States Constitution. His character is of the highest and his judicial temperament is unquestioned. I have studied his professional writings, especially in the field of constitutional law, and have visited his Law School and know firsthand his reputation as a legal scholar, and have concluded that his legal abilities thoroughly qualify him from a professional standpoint. While I may not agree with some of the positions that he has taken in the field of constitutional law, I have the highest respect for his professional integrity. Above all, I am convinced that he would, on the bench, faithfully follow the law and Constitution as interpreted by the Supreme Court and would in the process contribute to the intellectual

development of the law by reason of his scholarship and experience.

I understand you have personally met Professor Siegan and believe you would agree with me that his personality and intellectual attainments indicate that he would be an adornment to the federal bench.

Respectfully,

Herbert Brownell

HB:MC
cc: Hon. Strom Thurmond

University of San Diego

School of Law

Graduate Tax Program

March 23, 1988

Honorable Joseph R. Biden
Chairman of the Senate Committee
on the Judiciary
224 Senate Dirksen Office Building
Washington, D.C. 20510-6275

Re: Bernard H. Siegan

Dear Senator Biden:

I am writing to express my strong support for the appointment of Bernard H. Siegan to the U.S. Court of Appeals for the Ninth Circuit.

Professor Siegan is one of the most highly respected members of our law faculty and University, and is held in high esteem nationally by scholars, jurists, and the legal profession. He has an excellent reputation as a teacher and author, and, indeed, is widely regarded as a person of impeccable moral and humane characteristics.

As one who has often been associated with liberal, Democratic causes, and as a professor in the field of federal tax law for over 30 years, I am concerned about the reported opposition to Professor Siegan by those who question some of his philosophical positions and some of his economic theories expressed in his written works. The very nature of our appellate court system in this country is designed to encourage (rather than inhibit) diversity of views on matters not yet decided by the Supreme Court. Moreover, our judicial branch would be greatly benefitted by the addition of judges who have broad legal backgrounds where law and economics can be rationally utilized in a sensible, yet restrained manner. While I am not a student of constitutional law, my analysis of business, tax, and regulatory decisions of the federal courts, leads me to conclude that knowledge of economic criteria would not only bring the courts more in line with our other two branches of government, but, perhaps, more significantly, would aid in the further understanding and development of our civil and human rights problems as well.

I have known Professor Siegan for nearly five years; I

have read some of his written work and have had numerous occasions to discuss economic and legal issues with him. It is unfortuante that those who have opposed his nomination to the Court of Appeals have not had the privilege of knowing him better. He is a careful thinker who does care about both sides of any issue; his objectivity is quite admirable; his judgments are rational; his sense of commitment to precedent and to the judicial process is at least equal to the majority of judges now sitting on the federal bench.

I respectfully urge you and your colleagues to move forward in confirming this unusually well-qualified lawyer to the Court.

Thank you kindly for your indulgence.

Respectfully yours,

Lester B. Snyder
Professor of Law and
Director, Graduate Tax
Program

LBS/ml

EMORY UNIVERSITY
School of Law

Faculty
Gambrell Hall
Atlanta, Georgia 30322
404/727-6816

March 23, 1988

Senator Joseph R. Biden
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Biden:

I write to urge confirmation of the appointment of Bernard Siegan to the Court of Appeals for the Ninth Circuit. As you doubtless know, Professor Siegan is eminently respected in the academic profession as a teacher and a scholar. His work in land use, zoning, constitutional law and related areas is simply first-rate, displaying the qualities of analysis and judgment that are the hallmarks of our great jurists. It is also noteworthy that Professor Siegan has had considerable experience practicing law, which is obviously a great advantage for a future judge.

His intellectual acumen, academic experience and practical background all make Professor Siegan extraordinarily well qualified for the federal appellate bench. The all-too-rare combination of talents and experience argue for the expeditious confirmation of his appointment.

Sincerely,

Fred S. McChesney

Fred S. McChesney
Professor of Law

Policy Research in the Public Interest
HUDSON
I·N·S·T·I·T·U·T·E

4401 Ford Avenue • Suite 200 • Alexandria, Virginia 22302 • 703-824-2048

Washington Office

March 24, 1988

Senator Joseph Biden, Chairman
Judiciary Committee
United States Senate
Washington, DC 20510

RE: Nomination of Professor Bernard Siegan to the United States Court of Appeals for the Ninth Circuit

Dear Senator Biden:

I am writing to support the nomination of Bernard Siegan to the Ninth Circuit Court of Appeals.

I have been familiar with Prof. Siegan and his work for many years, in light of my professional focus on the rights of minorities and the poor. Prof. Siegan's contributions to the legal scholarship on these issues make him, in my opinion, the finest judicial nominee proposed during the entire Reagan Administration.

Prof. Siegan has focused extensively on two types of institutional barriers that adversely affect the ability of minorities and the poor to control their own destinies: zoning laws and barriers to economic liberty. These are issues that have been largely ignored by other scholars, to the detriment of large segments of our nation's population.

In the area of zoning, Prof. Siegan has demonstrated the devastating effect that exclusionary laws, passed under the guise of public welfare, have on the mobility of minorities and the poor. Prof. Siegan is the foremost scholarly architect in applying sound legal principles to counteract these effects and safeguard the rights of individuals. He should be commended for his sensitivity to these barriers and for demonstrating how they are inconsistent with the fundamental values of our Constitution.

In the area of economic liberty, Prof. Siegan has also identified barriers to entrepreneurial opportunities that are devastating to minorities and the poor, and again has advanced sound arguments that would

Corporate Office: Herman Kahn Center • 5395 Emerson Way • P.O. Box 26-919 • Indianapolis, Indiana 46226 • 317-545-1000 • Telex 855477
European Office: 31 Rue Montoyer, BTE 2, 1040 Brussels • (02)511-7201 • Telex UBFB 26146

lead to greater judicial scrutiny of these barriers. Many of these entrepreneurial restrictions serve no purpose other than to restrict competition and entry into businesses and occupations. They have seriously eroded many of the opportunities that have traditionally served as America's beacon to its enterprising poor. Without Prof. Siegan's pathbreaking scholarship in this area, we would be much farther away from removing these barriers to individual self-determination.

Many of Prof. Siegan's ideas are unique and provocative. In this respect he follows a great and rich tradition of American legal scholarship. I wonder where we would be if all legal scholars had docilely accepted the pernicious precedent of separate but equal embodied in the Plessy v. Ferguson decision. Fortunately, our tradition has always included scholars like Prof. Siegan who would challenge conventional wisdom and encourage critical re-evaluation of possibly misguided precedents. This is how our law evolves; and everything Prof. Siegan does supports the evolution of our law toward greater respect for fundamental individual liberties.

Prof. Siegan's maturity, sound judgment, and strong sense of justice will provide him the tools necessary to dispatch his duties as a federal circuit judge in a superb manner. His vital contributions to legal scholarship underscore his great intelligence and compassion. I urge you to support his nomination.

Very sincerely,

Clint Bolick
Attorney at Law
Senior Consultant

cc: Senator J. Strom Thurmond

SOUTHWESTERN
UNIVERSITY
SCHOOL OF LAW

March 24, 1988

Sen. Joseph Biden
Senate Judiciary Committee
224 Senate Dirksen Office Building
Washington, DC 20510

Dear Sen. Biden:

I write this letter in support of the confirmation of Bernard Siegan as a member of the Ninth Circuit Court of Appeals.

My acquaintanceship with Professor Siegan goes back many years, to when we were both young men in Chicago, Illinois.

He is a man of unmatched qualities of integrity, intelligence and compassion. He is even-tempered, meticulous in his thought processes, and imbued with a strong sense of fairness and a devotion to our constitutional liberties.

Bernie and I differ greatly in our political beliefs. We are far apart in ideology. I nevertheless have an enormous respect and admiration for him. Although I would not vote for him were he running for political office, I believe that his unique qualities, described above, precisely equip him to be an outstanding jurist.

I respectfully urge your approval of his nomination.

Sincerely yours,

Max A. Goodman

Max A. Goodman
Professor of Law

MAG/ja

675 SOUTH WESTMORELAND AVENUE • LOS ANGELES, CALIFORNIA 90005-3992 • (213) 738-6700

SP
PC

SOCIAL
PHILOSOPHY
& POLICY CENTER

Executive Director
Fred D. Miller, Jr.
Deputy Director
Ellen Frankel Paul
Associate Director
Jeffrey Paul
Assistant Director
John Ahrens
Executive Assistant
Kory Tilgner

Advisory Board
James Buchanan
Economics
Center for Study of Public Choice,
George Mason University
Richard Epstein
Law
University of Chicago,
Law School
Charles Fried
Law
Harvard Law School
John Gray
Politics
Jesus College
Oxford University
Gilbert Harman
Philosophy
Princeton University
William Kristol
Public Policy
Kennedy School,
Harvard University
Seymour Martin Lipset
Harren Mansfield, Jr.
Aaron Wildavsky
Leland B. Yeager
Economics

March 24, 1988

Senator Joseph R. Biden, Jr.
Chairman, Judiciary Committee
SR-489 Russell Senate Office Bldg.
Delaware & Constitution Avenues N.E.
Washington, DC 20510-0802

Dear Senator Biden:

I am writing this letter in support of the nomination of Professor Bernard Siegan to the Ninth Circuit Court of Appeals. I have known Siegan for over a decade in a professional capacity and, in recent years, we have become friends. Over the course of many academic conferences, and in editing a paper of his for a collection on the Constitution, and more recently as editor and co-publisher of his award-winning book, The Supreme Court's Constitution, I have found him to be a scholar of the highest originality and a person of impeccable good humor and highmindedness.

His scholarship ranks among the most original and provocative in the field of zoning and land regulation. His early piece, "Non-Zoning in Houston" (Journal of Law and Economics, 1971) is a model of empirical, field research. Rather than imposing a preconceived notion of the merits of zoning or the lack of it, Siegan spent months investigating land-use patterns in Houston (which then as now lacks zoning regulation) and then compared them with patterns in Chicago (a zoned city). In the process he discovered that many dearly-held beliefs about the ill effects of the lack of zoning were, indeed, suspect. Most interestingly, he discovered that rather than helping minorities and the disadvantaged, zoning seemed to act to their detriment, at least in their own estimation. While wealthy neighborhoods voted overwhelmingly for zoning when it was twice placed on the ballot, it was defeated because minority and disadvantaged districts voted decisively against it. "Non-Zoning in Houston" has become a classic in the field, and an article cited by virtually every scholar who works in this area. His conclusions have widespread implications for the improvement of the condition of the poor, minorities, and especially the homeless.

Economic Liberties and the Constitution (1980) is, likewise, a work of exceptional originality and careful scholarship. In this book, Siegan traced the development of the concept of due process from its origins in England and the continental

Social Philosophy and Policy Center
Bowling Green State University
Bowling Green, Ohio 43403-0185
(419) 372-2536

natural law theorists to its inclusion in the Constitution, through our present day judicial interpretation of it. It is the outstanding book-length treatment of the topic, and one that has shed a refreshing new light on the subject.

His most recent book, The Supreme Court's Constitution, is Siegan's first foray beyond his main scholarly interest in economic liberties. Again, it is an impressive scholarly achievement. While my own estimation may be somewhat colored by my role as editor and co-publisher of the book, that evaluation has been confirmed by the book's receipt of the runner-up/honorable mention award in the category of books on law from the prestigious Association of American Publishers/Professional and Scholarly Publishing. The winner in the category is a multi-volume collection of documents on the Constitution published by the University of Chicago Press (Philip P. Kurland and Ralph Lerner, The Founder's Constitution). That Siegan's book received this award in a year when more books were submitted than ever before is a testament to its extraordinary scholarly merit and innovative approach to the law.

I would like to add some reflections on Professor Siegan's beliefs and character. One point seemed to come up repeatedly at the Judiciary Committee's hearings on Siegan's nomination, and that was the question of whether Siegan would abide by Supreme Court precedent even when it might depart from his interpretations as expressed in his scholarly work. Siegan assured the committee that, indeed, he would abide by Supreme Court precedent as is appropriate for lower court judges. However, there seemed to be some doubt among some members of the Committee that someone of his strong convictions would act in this way. I can recall vividly a conversation that I had with Siegan at a conference that we both attended in Toronto in April of 1986, well before his nomination to the Circuit Court was even a prospect. This conversation may help to alleviate the concerns of the Committee.

The conference brought together Americans and Canadians, academic lawyers mostly, to discuss various aspects of the newly enshrined Canadian Constitution. What we Americans soon discovered was that our Canadian friends had by design avoided any mention of economic liberties or even a due process clause in their constitution. I asked Siegan after one session what he would do if he were a judge on a Canadian appellate court: would he try to read economic liberties into the Canadian Constitution, or would he, following his "original intent" view of how the American Constitution ought to be interpreted, refuse to engage in "judicial activism in behalf of economic liberties." He answered that as a judge he would be sworn to uphold the Canadian Constitution and he would have to look to the original intent of the framers of it, and if their intent was to exclude economic liberties from constitutional protection, he would abide by their decision, no matter that he might personally object to that exclusion. He asked me in turn what I would do, and I flippantly replied that "I would be the Justice Brennan of Canada; that I would embrace judicial activism with a vengeance."

Siegan replied that he found my position indefensible and that he could never do that. Thus, I found Siegan's remarks to the Judiciary Committee, rather than being anything novel in his approach or expressed with the hope of enhancing his chances of confirmation, entirely consistent with views that he has held over many years, and that I have personally heard him express at various occasions.

On Siegan's character, I would add a few short remarks. As editor of several of his works, I have always found him to be eager to receive criticism, willing to revise manuscripts to take account of such criticism, and in general a pleasure to work with. I can say this about relatively few individuals in academic life. (I have edited the work of several hundred authors for publication, so I speak from long and often aggravating experience.) At scholarly conferences and in private conversations, he is always open to new ideas, generous with critics, and willing (and eager!) to have his own work subjected to the criticism of his colleagues. On this latter point, my Center hosted a conference on The Supreme Court's Constitution, which was attended by legal scholars and journalists. I chaired the sessions and told Siegan beforehand that he would have time at the end of each session to respond to criticism, and that he was free to interject his responses at any other time that he wished. Contrary to the behavior of other authors at conferences dedicated to their books, Siegan was the model of restraint. More often than not he declined to respond immediately to even heated criticism, preferring to hear the thoughts of others and reflect upon their objections before responding. Most scholars behave as though their own work is unassailable and their critics all misguided. Siegan's response was entirely different, and should serve as a model of how a true scholar treats critics and criticism.

Finally, let me say that I urge the members of the Committee to give Professor Siegan their endorsement for a seat on the 9th Circuit Court of Appeals. His character is a model of "judicial temperament," his contribution to legal scholarship is outstanding, and he will make an open-minded judge. I have suffered with him this last year as his confirmation has hung in the balance; it would be a terrible shame, and a blemish on our republic, if such a fine man were denied this office for which he is eminently qualified for political reasons having scant relationship to his competence or his character.

My apologies in advance for the length of this letter.

Sincerely,

Ellen Frankel Paul
Deputy Director and
Professor of Political Science

xc: Senator Strom Thurmond

Jewish Federation of Greater Toledo

6505 Sylvania Avenue
P.O. Box 587
Sylvania, Ohio 43560
(419) 885-4461

OFFICERS
PRESIDENT
Maria Levine
VICE PRESIDENT
James Akers
VICE PRESIDENT
Larry Kaskell
SECRETARY
Marcia Loer
TREASURER
Michael Beregovsky
EXECUTIVE DIRECTOR
Steven J. Edelstein
ASSOCIATE DIRECTOR
Sydney Vostov
ASSISTANT TO THE DIRECTOR
Alix Greenblatt

SPONSORING
United Jewish Fund Campaign

MEMBER AGENCIES
and SERVICE
Toledo Board of Jewish Education
Darrington House
Jewish Community Center
Jewish Family Service
Toledo Jewish Community Foundation
Holocaust Resource Center

March 25, 1988

The Honorable Joseph R. Biden, Jr.
489 Russell Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Biden:

On behalf of the Community Relations Committee of the Jewish Federation of Greater Toledo, we urge opposition to Professor Bernard Siegan's nomination to the United States Court of Appeals for the 9th Circuit.

Our opposition is founded on Professor Siegan's views of the constitutional protections of fundamental liberties, individual freedoms and civil rights. In particular, we are concerned over Professor Siegan's opposition to the "incorporation doctrine" with respect to the separation of church and state, noting his belief that the establishment clause of the first amendment does not apply to states.

In addition, he has criticized the U.S. Supreme Court for decisions on other constitutional issues including school desegration and free speech. We would deeply appreciate your considering our sentiments as you review Professor Siegan's nomination. With best wishes.

Sincerely,

Howard Friedman
Prof. Howard Friedman, Chair
Domestic Task Force

Irma Sheon
Irma Sheon, Chair
Community Relations Committee

Steven J. Edelstein
Executive Director

SJE:pmu

The University of Puget Sound School of Law

Jim Bond
Dean

March 25, 1988

Senator Joe Biden
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

I am writing to endorse the nomination of Professor Bernie Siegan to the 9th Circuit Court of Appeals. I have known Professor Siegan for years. Moreover, I teach constitutional law and am familiar with his recent works on the Constitution.

Professor Siegan is an astute scholar whose research has illuminated many difficult and controversial questions of constitutional law. His views are deeply rooted in the philosophical tradition of those who wrote the Constitution, and he is deeply committed to the values that have shaped the American culture - not least of all, the role of law.

He would bring intelligence, understanding, and humility to any court on which he served. He works well with persons of diverse views. Professor Siegan is one of those rare persons who can reconcile competing views without sacrificing his own integrity or independence. In short, he would be a good judge's judge.

Sincerely,

Jim Bond

James E. Bond
Dean

JB/db
cc: Senator Strom Thurmond

Office of the Dean
Norton Clapp Law Center ■ 950 Broadway Plaza ■ Tacoma, Washington 98402-4470 ■ (206) 591-2273

The State University
in Northern Virginia

4400 University Drive
Fairfax, Virginia 22030

Economics Department
(703) 323-2344

George Mason University

Senator Joseph Biden
U.S. Senate Judiciary Committee
Washington, D. C. 20510

March 25, 1988

Dear Senator Joseph Biden:

This letter is in reference to Bernard H. Siegan's confirmation to the U.S. Ninth Circuit Court of Appeals.

I first met Professor Siegan in 1978 in his position as Distinguished Professor of Law and Director of Law and Economic Studies at the University of San Diego School of Law. Since that time I have come to respect Professor Siegan as an honest person of impeccable character and enormous scholarship in several important areas of the law.

Combined with these attributes Professor Siegan has a profound respect and sensitivity to human dignity and rights that becomes obvious to anyone who has listened to his lectures or read any of his books and numerous scholarly articles. Professor Siegan's commitment to human dignity, rights, rule of law and constitutional principles is, in my opinion, best illuminated in his book Economic Liberties and the Constitution. Just a cursory reading of this work will show Professor Siegan is within the mainstream of thinking of our great jurists such as Justices Story, Field, Marshall and Reynolds.

The controversy surrounding Professor Siegan's confirmation derives from his commitment to constitutional fidelity and his interpretation of Rule of Law. From the constitutional perspective, Professor Siegan controversy stems from his view that there should be substantive due process interpretation of the Fifth and Fourteenth Amendments where the court is obligated to protect an individual's economic liberties. In modern America, where a huge array of special interests groups seek to use the coercive powers of government to form various kinds of collusions, the protection of the individual's economic liberties has become at best a tertiary concern and at worse an idea beneath contempt.

Another focal point for the controversy surrounding Professor Siegan's confirmation is his commitment to the Rule of Law, or to use its Latin derivation, Rule by Legis. Rule of Law means the law is abstract in the sense that morality dictates that the laws should be

common to all citizens regardless of their rank and no privileges or statutes should be enacted whereby the law treats the citizen differently than it does another.

From all that I know about Professor Siegan, the Rule of Law is his beacon. Such a position is in conflict with the emerging American value of Rule by Privilegis, deriving from the Latin term private law. This value sees the job of the law as that of determining "good" outcomes and to the extent that individual liberties interfere they are to be suppressed.

Regardless of our particular values, it is in our interest to preserve and recapture our legacy of liberty. Too much of man's history has seen the principles of limited government and Rule of Law scuttled in the pursuit of other ideals and goals. What has always happened is those ideals and goals are not achieved but the elimination of limited government and Rule of Law helps pave the way for tyranny.

I cannot guarantee that Professor Bernard Siegan's confirmation to the U.S. Ninth Circuit Court of Appeals will change our direction but his presence will serve as a constant reminder and challenge to us to return to those legal principles that made our country a reservoir and defender of liberty.

Without reservation or doubt of any kind I strongly urge you to proceed and confirm the appointment of Professor Bernard H. Siegan to the U.S. Court of Appeals.

Sincerely,

Walter E. Williams

Dr. Walter E. Williams
John M. Olin Distinguished
Professor of Economics

Federal Maritime Commission
Washington, D.C. 20573

Office of the Chairman

March 31, 1988

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I am writing to urge you to vote to confirm the nomination of Bernard M. Siegan to become a judge of the Court of Appeals for the 9th Circuit.

I was a tenured Professor of Law at the University of San Diego School of Law when Bernie joined the faculty. We have remained friends ever since, although contacts between us have been limited to telephone calls, letters, and occasional meetings since I came to Washington in May 1981 to become the Deputy Assistant Secretary of Defense for Reserve Affairs, a post which I held until I joined the Federal Maritime Commission in June 1984.

During the years we spent together on the law faculty, Bernie and I had innumerable conversations on legal philosophy and ethics although we were not involved in the same substantive fields of law. I developed a deep respect and admiration for him as a legal researcher, a creative, critical analyst, a dedicated and caring teacher, and as a warm, gentle, courtly human being who cares deeply about the welfare of this nation, its people, and its legal institutions. I can think of no one who is more honest, ethical and fair than this dedicated scholar.

I have followed Bernie's confirmation process very carefully in the media and I am appalled at the characterizations of him that have been drawn. They do not even resemble the man I know him to be. Especially defamatory are the allegations that if elevated to the bench, Bernie would not follow the law as it has been pronounced by the Supreme Court but would insidiously undermine current law with his personal philosophies. Nothing could be further from the truth. Bernie is so totally dedicated to the legal institutions of this nation that he would never perform any action which might weaken those institutions, much less follow a course of conduct which would be so detrimental to the continued vitality of those institutions as refusal to apply rulings of the Supreme Court. The fact that he has criticized the legal analysis behind some Supreme Court decisions should not

generate any fear that he would attempt to weaken those decisions if confirmed. An appellate judge's primary duty is to apply the rulings of the Supreme Court and I have utterly no doubt that Bernie, like most if not all judges in this country, would perform that duty. Judges everywhere can identify high court rulings with which they disagree but nevertheless they apply those rulings as the law demands. Bernie would unquestionably do the same because he is a man of the greatest integrity and loyalty who is devoted to those legal institutions.

It should be remembered that it is the function of legal scholars to analyze, criticize, and formulate theories and recommendations in the field of law. Bernie has done so brilliantly and proliferatly, but in my opinion not always correctly. But it is the very process of debating legal concepts openly and honestly in the intellectual marketplace of the legal literature that is of paramount importance, not the particular conclusions to which one scholar comes. Only through that open, honest process can we hope to improve, if not perfect, the weave of our intricate fabric of laws. If it is perceived that one legal scholar is denied elevation to the bench solely or primarily because he has published honest but currently unpopular views in his search for truth then, inevitably, other legal scholars with ambitions to ascend the bench will not openly and honestly publish their views. The chilling effect on the analysis and criticism of our legal institutions will ultimately result in those institutions becoming moribund.

Failure to confirm Bernie Siegan will not only deprive the Court of Appeals of an outstanding legal intellect but the process of denying him this position, as I have witnessed the confirmation in the media, will do incalculable harm to the very institutions you and the other Members of the Committee on the Judiciary are dedicated to protecting and improving.

Sincerely yours,

For and By Direction
Edward J. Philbin
Commissioner
and Acting Chairman

cc: The Honorable Strom Thurmond

Dictated But Not Read

THE DICKINSON SCHOOL OF LAW
CARLISLE, PENNSYLVANIA 17013

DALE F. SHUGHART
PRESIDENT

MICHAEL J. NAVIN
DEAN

April 4, 1988

Senator Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington D.C. 20510

Dear Senator Biden:

Following are my comments concerning the nomination of Professor Bernard Siegan to the Ninth Circuit Court of Appeals. These comments are in the form of testimony which I prepared for your committee when it appeared you would seek testimony in support of Prof. Siegan. Please accept my thanks in advance for your willingness to consider my views.

My name is Michael Navin and I reside in Carlisle, Pennsylvania. Since last July 1, I have served as Dean and Professor of Law at the Dickinson School of Law also in Carlisle, Pennsylvania. From June of 1973 until last July 1 I served on the faculty of the University of San Diego School of Law and in that connection came to know Professor Siegan very well as a friend and colleague. What I propose to speak to you about is my view of what judges do, the characteristics that are required for someone to be a good judge and why I believe Professor Siegan possesses all of the qualifications in abundant measure that will enable him to serve our country well as a judge on one of its most important courts.

THE FUNCTION OF JUDGES

A. Perhaps one of the most important functions of a judge is to interpret and apply law or legal principles to specific situations. To do this well a judge must have two characteristics. He or she, first, must be a careful researcher of the sources of law and, second, must approach the search with an open mind concerning what will be discovered. A judge must also keenly be aware that once the law to be applied in a case is discovered the job of deciding the case is only half done. To decide a case these two parts of the process must be brought together. In an appellate court such as that for which Professor Siegan has been nominated, the facts of the case will be those contained in the record made below so the role of the appellate judge is not really concerned with the development and finding of facts but with the use of facts already provided. For appellate judges, then, a thoroughgoing regard for analyzing and researching the sources of law is a must.

B. Another important function of a judge is to mediate and interpret the will of the majority for individuals. Perhaps this is a redundant way of expressing what is inherently the process of deciding cases but I tend to think it involves something more which necessitates going beyond mechanically deciding cases to include the ability to visualize oneself as part of a decision making process by which society functions better and more justly through the rule of law.

C. Judges must also understand that they stand between individuals and organized power, especially that of the state. While judges act somewhat neutrally in mediating society's rules for individuals they must never forget that our system is based on a ceding of power by individuals to the states and by the states to the federal government. Behind all of the trappings of governmental power there lie the individuals who created those trappings and whose fundamental individuality is beyond the power of all other individuals acting collectively to reach. When society attempts to reach this core of individuality it is a judge's duty to insure that the majority can only invade that realm of individuality in a constitutionally lawful manner. To me, this role of acting as the protector of individual rights is the essence of what it means to be worthy of being called "Judge." To me understanding this as part of the judicial role is the bedrock requirement of anyone seeking to be a judge.

THE QUALITIES NEEDED TO PERFORM AS A JUDGE AND HOW PROFESSOR SIEGAN POSSESSES THEM.

A. Judges must have a sense of perspective to exercise judicial power fairly. They must be able to view cases both as individual events and also as part of a larger pattern of just decisions. Professor Siegan has a broad base of experience both in life generally and in the law particularly. He has extensive practice experience and an exceptionally distinguished record of accomplishment in legal scholarship which will serve him well in a judicial position.

B. Every judge must possess deep seated intellectual honesty by which I mean the willingness to act upon whatever results one's research produces. We all have our own world views that determine how we approach resolving problems. Bernie is no different and I have had frequent opportunities to discuss legal issues with him. In my experience he always starts his analysis with a rigorous statement of the problem followed by working to whatever end reasoned argument dictates. One of Professor Siegan's favorite starting points in analyzing cases involving constitutional principles is the idea of "original intent." Certainly this is a sensible point from which to begin to decide which constitutional rule of law should be applied. Not all scholars utilize this methodology but in my opinion none can argue that this approach is irrational. My experience with Bernie is that, while dogged in some of his basic approaches, he remains open to persuasion by reasoned argument. I think he possesses just that quality of intellectual honesty necessary to make him a good judge.

C. Judges must be patient and I know Professor Siegan to be a patient and thoughtful man. Bernie never flies off the handle and always waits to hear all sides of a story before deciding how to act.

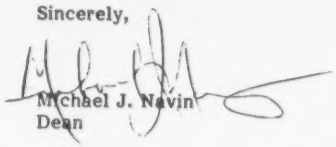
D. Judges need to have a sense of what it means to be human in order to justly decide cases affecting individual people. Bernie Siegan has lead a varied life beginning with growing up in a Chicago Ghetto where only Yiddish was spoken followed by extensive practical legal experience in that same city ultimately leading to an unusually rich career as a productive legal scholar and teacher. Bernie has met all kinds of people and has lived a variety of roles. Without a doubt I can say I would be comfortable having Bernard Siegan act as my judge.

E. Judges need compassion and Bernie has it amply. I have known him to be very interested and concerned with the welfare of his students and others. I also watched him go through the almost unbearable travail of seeing his beloved wife, Sharon, learn of her affliction with cancer, be operated upon and seem to recover and do very well for several years only to suffer a relapse from which she ultimately died. I do not think Bernie would mind if I described Sharon's death as the horror which it was. Through all of this Sharon and Bernie never gave up hope and never failed to be available to comfort others suffering as much as they. Never once during this time did I ever observe this gentle man despair or fail to do his best for others. I say this with sincere conviction and deep admiration for someone who is wonderfully human.

CONCLUSION

As a lawyer and legal educator I believe it is important for the Senate to exercise its proper role in confirming a President's choices for the federal judiciary. I think you must assure yourselves that Bernard Siegan is qualified to join the Ninth Circuit and I think that upon reflection your careful scrutiny will lead to the inescapable conclusion that Bernard Siegan is an outstanding choice for this important court. Thank you.

Sincerely,



Michael J. Navin
Dean

MJN/mf

cc: Senator Strom Thurmond

315 SOUTH PLYMOUTH COURT • CHICAGO, ILLINOIS 60604 312/427-2737

The John Marshall Law School

April 11, 1988

Hon. Joseph Biden
Chairman, Committee of the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Biden:

This refers to Bernard H. Siegan, who is professor of law at San Diego and is presently before you on a nomination to the 9th Circuit Court of Appeals.

My friendship with Bernie goes back, I would say to about 1955 or thereabouts. I was at that time a title officer for Chicago Title Insurance Company and Bernie was very active in the practice of real estate law. My job was to work out difficult title problems, such as clearing title to abandoned cemeteries, an actual case Bernie and I cleared as to land not yet devoted to gravesites. The nature of Bernie's practice was such that we saw each other at least once a week, lunched together. We grew to respect each other as lawyers. I have cited him as authority in my book, Real Estate Law, 9th ed. 1988 page 469. My respect for this man as a lawyer is very great. He had the courage to tackle jobs that others feared to tackle. Of his honesty there is no question whatever. In all the years I worked with him there was no complaint whatever about his probity. This man is unfailing in his courtesy and thoughtfulness for others. In short, his "judicial temperament" is very great. His school obviously respects him, since he is a "distinguished professor", as I am. I wish he were back in Illinois. We would put him on the bench here.

Sincerely,

Robert Kratovil

Robert Kratovil
Distinguished Professor of Law

/g

The John Marshall Law School does not discriminate in admissions, services, or employment on the basis of sex, race, color, religion, national origin, ancestry, age or physical handicap in accordance with provisions of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973 and other existing Federal and State laws and executive orders pertaining to equal rights.

NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE

2000 NORTH RACINE SUITE 3500 CHICAGO, ILLINOIS 60614 (312) 528-0818

BOARD OF DIRECTORS
B. Jaye Anno, Ph.D.
Ex Officio
Glen F. Ackerman, M.D.
Am. Acad. of Family Phys.
Joan Banach, RRA
Am. Med. Record Assn.
Carl C. Bell, M.D., FAPA
National Medical Assn.
Scott Chavez, PA-C
Am. Acad. of Phys. Asss.
Edythe Craig, D.O.
Am. Osteopathic Assn.
Richard Paul Dorna, Sheriff
National Sheriffs Assn.
Nancy Nevelloff Dubler, LL.B
Am. Public Health Assn.
Samuel Echold, M.D.
Am. Diabetes Assn.
Fred L. Foreman, J.D.
American Bar Assn.
David A. Gehlhoff, M.D.
American Psychiatric Assn.
Lawrence J. Guzzardi, M.D.
Am. College of Emerg. Phys.
Donald H. Hanscom, M.D.
Am. Soc. of Internal Med.
Bernard P. Harrison, J.D.
Ex Officio
Robert Hilton, R.Ph.
Am. Pharm. Assn.
Barbara I. Hladki, M.S., R.D.
Am. Dietetic Assn.
Elisabeth Lassers, M.D.
Am. Acad. of Child Psych.
Douglas A. Mack, M.D., M.P.H.
National Assn. of Counties
Michael I. Mahoney
John Howard Assn.
Edwin I. Megargee, Ph.D.
American Psychological Assn.
Charles A. Meyer, M.D.
Am. Acad. of Psychiatry & the Law
Jeffrey Mitchell, M.D.
Am. Soc. for Adolescent Psych.
Rona M. Murray, R.N., M.A.
American Nurses Assn.
Bonnie Norman, R.N.
Amer. Jail Assn.
Ms. Juanita Orgler, R.N.
Am. Public Health Serv. Assn.
James A. M. Owens, M.D., FAAP
American Academy of Pediatrics
C[illegible] Rout, M.D.
[illegible] of Physicians
L[illegible] Rich, D.D.S.
[illegible] Dental Assn.
[illegible] Thomas
[illegible] Assn. of America
[illegible] Thompson, M.D.
[illegible] of Medical A[illegible]
[illegible] B. Weinstein, M.D.
[illegible] of Phy. Med. Phys.

Robert Hilton, R.Ph.
Chairman
James W.M. Owens, M.D.
Chairman-Elect
Bernard P. Harrison, J.D.
Secretary
B. Jaye Anno, Ph.D.
Secretary-Treasurer
Charles A. Fasano
Chairman of the Corporation
Bernard P. Harrison
Executive Director

April 12, 1988

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Biden:

I write to you and to the Senate Committee on the Judiciary, in support of the nomination of Professor Bernard Siegan for Judge of the United States Court of Appeals, 9th Circuit. My letter is a personal one, and not in behalf of the National Commission on Correctional Health Care or any of its supporting organizations.

I've known Bernard Siegan nearly 50 years, first as a high school friend and later as a lawyer and real estate developer. In the latter relationship, I came to closely observe Mr. Siegan's character and principles when I served as corporation counsel for Skokie, Illinois, a community of some 50,000 residents. It is particularly in this reference, that I write.

Skokie, Illinois, during the years that I served as its legal counsel (1959-61) and later as a member of its Board of Trustees (1965-1969) was a fast growing post-World War II city. From a pre-war population of less than 10,000, it quickly grew in the post-war years, to more than 50,000 and eventually stabilized at about 65,000. Most of the rapid growth took place in the 50's and 60's, with the community experiencing all the problems that were common to many suburban cities and villages across the country. In my position as corporation counsel, and later as a trustee, I was very much involved with planning and zoning in order to maintain an appropriate balance of land uses and to retain a clear recognition of the constitutional rights of all property owners and the needs and welfare of Skokie residents.

At the time, Bernard Siegan represented ownership in a number of parcels of land, some of which required changes or variations in zoning because of the peculiar

character of the property or because the adjacent and surrounding areas had established uses which were clearly incompatible with the land in question. While many other landowners and their counsel placed their own perceived legal rights far ahead of the rights of the people, such was not the case with Mr. Siegan.

Bernard Siegan met with me and my staff, with homeowner associations, and with resident groups in all cases where there was, or might be, a difference of opinion as to the proper use of his land. He spent long evening hours and weekends resolving issues. At all times, his concern for the rights of the home owner or tenant appeared clearly paramount to his own interests, and in each situation he offered, or agreed to, changes and self imposed restrictions not legally required but which gave clear evidence of his desire to ensure that no harm would come to either the adjacent owners or to the community.

While many other vacant landowners were busy attacking the community's land use plan and zoning ordinance through Court actions, Bernard Siegan demonstrated a concern and compassion for the community and the people who lived there.

I understand that the appointment is being challenged by some who question his position on social issues. In response, I say that my discussions with him and my observation of his actions lend only one conclusion as to his integrity and position on matters of justice, right, and human considerations.

Professor Siegan, even in the 1960's, offered thought provoking concepts on the appropriateness of zoning laws. Our conversations were stimulating but there was never any doubt that his underlying concerns were always for the rights of individuals and the public good.

I have no basis for judging the "legal" qualifications of Professor Siegan for the appointment for which he is being considered. But a keen sense of fairness and

justice, and calm temperament, surely must be necessary qualifications, too. For these attributes, I strongly endorse Professor Siegan's appointment and urge the favorable action of your committee.

Sincerely,

Bernard P. Harrison

BPH/mb

cc: Hon. Strom Thurmond, Senator

Washington
WASHINGTON·UNIVERSITY·IN·ST·LOUIS

School of Law

Daniel R. Mandelker
Howard A. Stamper Professor of Law

May 9, 1988

Senator Patrick Leahy
Duerksen Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

I understand that your committee will vote sometime this week on the nomination of Bernard Siegan to the Ninth Circuit Court of Appeals. I have no personal objection to Professor Siegan, who is a personable man. I oppose his appointment because, as a land use scholar, I believe his views on land use law are at odds with established judicial precedent and represent a point of view that the federal courts have discarded. I recommend that the committee reject his nomination and urge that it not send the nomination to the floor of the Senate.

Sincerely,

Daniel R. Mandelker

DRM:ms

Washington University
Campus Box 1120
One Brookings Drive
St. Louis, Missouri 63130
(314) 889-6441

Senator LEAHY. I will turn it over to Senator Metzenbaum of Ohio.

Senator METZENBAUM [presiding]. I have just advised Senator Hatch and Senator Heflin that the Chair is going to have to shut down this hearing at 12:30. I was supposed to take over at 11:30, but I guess there was a little delay on it. No problem at all.

Professor Siegan, it is nice to see you here this morning, sir.

Mr. SIEGAN. Thank you, sir.

Senator METZENBAUM. I do not think I have had the privilege of meeting you. It must be something about the air out there in San Diego that brings us in these especially conservative jurists. But nice to have you with us.

I have had a chance to review your record, and I understand, I think, why there is so much concern about your nomination. Being a conservative is not an issue. Being a conservative judicial activist is somewhat of a problem. Being a liberal judicial activist would be an equal kind of problem.

It is interesting to me that even conservatives are concerned about your nomination. It has been pointed out to me that James McClellan, president of the Center of Judicial Studies, said, "Siegan is a judicial activist. Conservative judicial activism is just as wrong as liberal activism."

You criticized the Court for using its powers to end segregation, but you want the Court to use its power to strike down employment discrimination laws.

You criticize the Court for upholding its power to protect first amendment rights, but you want the Court to use its power to protect businesses from environmental legislation. You criticize the Court for using its power to protect the rights of women, but you want the Court to use its power to strike down zoning laws. It does not surprise that Judge Bork has said your philosophy, quote, "works a massive shift away from democracy and toward judicial rule."

I wonder if you would want to address yourself to the matter of concern that I think many of us in the Senate have about conservative judicial activists and liberal judicial activists and the whole issue of the degree of activism that we have a right to expect from the judicial nominees.

Mr. SIEGAN. Senator, I do not regard myself as a judicial activist. With respect to what the existing law is, I have gone through my views with Senator Heflin in an effort to show that as a judge it would be contrary to my oath, it would be direct violation of my oath to push my positions ahead of the U.S. Supreme Court's.

As you may have heard, the effort I would make at all times is to observe the law of the land, and that is as interpreted by the Supreme Court no matter how hard it was to find that law. That is not an activist.

Senator METZENBAUM. Did you not also say to Judge Heflin in response to one of his questions that you would follow those precedents unless you felt they were unwise and unjust? Did I not hear you correctly?

Mr. SIEGAN. Unless my conscience said otherwise to me—and this has happened with judges in Germany; they should have resigned. I want to say to you I will follow the Court, the Supreme

Court, unless the rule is unconscionable to me, at which point I will not follow that rule.

Senator METZENBAUM. I understand that.

Mr. SIEGAN. And I will resign.

Senator METZENBAUM. But you did not use the word "unconscionable." You said unwise and unjust.

Mr. SIEGAN. Well, I may have been loose in my language because I am not going to remove myself on a very narrow interpretation of those words. But I want to make the point as clearly as I can, and I think that makes it, I will observe the law of the land as interpreted by the Supreme Court.

If a case comes where my conscience says I cannot observe the law of the land, my duty is to resign. Short of resigning, I will do as I think the oath of office obligates me to do, and I will try and do so with all effort I have as best as I can.

Senator METZENBAUM. Give me an example, professor, where you feel that a previous Supreme Court decision exists—the precedent is there; there is a case before you involving first amendment rights, involving zoning, involving the rights of women, involving the rights of children, involving the issues of busing, whatever—where you can envision a situation where you feel that following the precedents would be unconscionable.

Mr. SIEGAN. I cannot give you—I would be happy to think about it. The only example I can give you which I would feel comfortable with is the situation that arose in Germany when the judges said, well, I had to follow the law that led to extermination of people.

I think that was a place where the judge, if he had a conscience, should have left that position. However, short of that, I would have to give a great deal of thought. We are talking about a position that I would be taking where I know that many times I will rule contrary to my own feelings. Every judge does that, and I expect to do that and I am willing to do that.

Senator METZENBAUM. Let us bring it closer to home. When you talk about Germany, it is such a heinous situation that it immediately brings up specters of the holocaust and millions of people losing their lives with no rhyme or reason.

Now, let us assume that we go back in our own history and there is a case before you which has to do with taking the property of Indians for that which very well may be an unconscionable amount of money, too little, almost nothing. And the case comes before you and, based upon the precedents, the Indians really do not have many rights.

And what would you do in that kind of case? But the law is very clearly on the side of the U.S. Government, but it seems somewhat unconscionable to treat the Indians in that manner.

Mr. SIEGAN. I cannot give you an answer to that without going into the facts of the case. I am merely giving you my evaluation of the job of circuit court judge, and that is when it becomes unconscionable to follow the rules of the Supreme Court, that judge should resign.

I have not thought through every possible situation, and the situation you give me, I could not possibly give it fair consideration. I could give you an off-the-cuff answer and I do not think you would be happy with it and I would not be happy with it.

Senator METZENBAUM. Does that open up a Pandora's box that what may be unconscionable for Judge Siegan might not be unconscionable for some other judges, other jurists who had similar matters before them? Is it unconscionable to bus students?

Mr. SIEGAN. Perhaps I have not explained it well, but the only situation I could think of was the one that was suggested by the German situation.

I think that indicates to you that a judge should be willing to be part of the law enforcement system unless there is something horrendous. I will go much further than the original words because I had wanted—I really had not thought that through clearly, but we are in the same forum; we can change our words.

I do not know if another judge would leave, but all that would happen was that I would be honoring my conscience and leaving. I do not know that there is a Pandora's box. I think every judge has his own life to lead.

In my case, I have told you I do not want to do horrible things if my duty requires me, and the best solution I know is to just get out of that job. Others may interpret it entirely differently.

I am inclined to think that in our country—and I have met many judges—if there were horrible situations, and I am again using for identification the German situation, many of them, if not most of them, if not perhaps all of them, would leave the bench, as they should, in my view, if they were asked to be party to a human slaughter.

Senator METZENBAUM. Well, let me ask you, in the area of zoning, there is a very poor woman who owns a piece of land in an area that is zoned for environmental use, recreational use, that cannot be built on. The woman is pretty close to—she is on the poverty level. She is in very difficult straits; she needs money for a major operation.

She could sell the property for more than enough money to provide for her medical treatment as well as her economic concerns. Would it be unconscionable to keep her from doing that by reason of the zoning laws?

Mr. SIEGAN. Senator Metzenbaum, perhaps I have not explained myself. As a judge, I am really not what you might say a social court. In almost all instances I can think of, if not in all instances I can think of, I would follow the law of the land, and that may at times—every day judges do things that they do not like to do.

I have given you an exception. Please understand it is an exception. I have defined it as closely as I can and I have identified it with the kind of situation that many judges and many people have thought about, the problem that faced the judge in Germany.

I do not expect to find that here. If that occurs—and let us hope as much as we can, of course, that that will not happen—that is the exception. As a rule, I will do what the oath of office wants, and at times it is going to hurt people, at times it is not going to hurt people.

The objective we have is we say, sure, we are going to hurt people at times with our law. We do not want that to be, but we go along with the law because the law serves our society and keeps it intact and is responsible for preserving it.

Senator METZENBAUM. In your response to questions I submitted, you said again that the 14th amendment was never intended to apply to voting discrimination, office-holding, jury service, and public schools.

I understand that you now say you support the decisions which apply the 14th amendment to these activities. Have you ever written that before these hearings?

Mr. SIEGAN. Senator, I said in my book, and it is very clear, that the framers of the 14th amendment in their day said the—they did not intend the 14th amendment to apply to certain things. That is my research.

I have gone through the 14th amendment. I think I have read all the debates on the 14th amendment over and over again to figure out what those people wanted, the 39th Congress that framed the 14th amendment. I conclude that is what they wanted. I do not say that is right. I make no judgment as to whether it is wrong. I am a reporter reporting history.

Now, the next question that you asked is will I follow that. Well, I will not, and I do not advocate that situation in any way. The law is settled in that area. The law is not consistent with what I find history to tell us. That is the rules of the game.

Living in an organized society means that you will frequently be enforcing laws that may not be accurate or may not be correct. But, today, that history has been rejected by the U.S. Supreme Court. That is final as far as I am concerned.

Senator METZENBAUM. My question to you is, have you ever stated that you would support those decisions which apply the 14th amendment to these activities prior to these hearings?

Mr. SIEGAN. No.

Senator METZENBAUM. You have also criticized title VII of the Civil Rights Act of 1964, the most important employment discrimination statute. You said that the principal accomplishment of title VII is the imposition of higher prices and the acceleration of inflation.

It is not surprising to me that your confirmation is opposed by many woman and minorities. Do they not have reason to believe that you will be hostile to the enforcement of these laws because you believe that they are harmful to society?

Mr. SIEGAN. I see no reason for that, Senator. I am an honorable man. There is nothing to suggest in my record that I will not do that which I am required to do. I take an office for this job and I will follow the requirements of that office.

There is nothing in my record to suggest that I am not honorable and that I am not completely dedicated to duty. I love this country. I am not about to do anything harmful to this country, least of all refuse to follow its law when it honors me with that high position.

Senator METZENBAUM. I have an article before me which I have not read but which my staff just gave me dated January 28th, 1978, from the Orange County Register called "Failure of Anti-Discrimination."

Did you in that article indicate that indeed you are hostile to the enforcement of anti-discrimination laws?

Mr. SIEGAN. I would have to see the article. I wrote for 5 years as a newspaper columnist. I do not believe I said that. I am quite sure

I did not say that. I have never suggested that someone not follow the law of the land.

Senator METZENBAUM. The quote I am referring to is where you say that "the principal accomplishment of title VII is the imposition of higher prices and the acceleration of inflation."

Mr. SIEGAN. Senator, I do not remember that, but it is very possible that I have—it is very possible that I have that opinion. Does that make me a racist? I do not know if you heard me. I may have that opinion, but that does not make me a racist.

I may have an opinion that certain laws that are passed to benefit people do not operate to benefit people. That is my conclusion as a scholar, as a citizen. I see no reason why people should oppose my nomination for this reason. Not only should they not oppose me; they should benefit from my wisdom and perhaps think through the problems I have suggested.

I would have to read this, and I would be happy to do so in a while. I just do not remember this article at all.

Senator METZENBAUM. We will put the entire article in the record.

[The article follows:]

[From the Orange County Register, Jan. 28, 1978]

FAILURE OF ANTI-DISCRIMINATION

(By Bernard Siegan)

One problem with government programs is that they are very difficult to turn off. People become dependent upon them and understandably fight efforts of curtailment. Thus the strongest opponents of airline deregulation were most of the major carriers. They have geared their operations to the will of the government regulators and fear the prospects of unrestricted competition.

Currently civil rights organizations are experiencing the problem. Their leaders decry President Carter's budget restraints, having become accustomed to federal welfarism and accepted it as the only solution. They find it difficult to agree that the control of the budget deficit is in the interests of the poor. The current public dedication to less spending and less government ought to cause civil rights groups to rethink and reappraise their situation.

"To control inflation is the best thing I can do for those with relatively poor incomes," Carter recently told a press conference, and a great many economists agree. However, inflationary spending and deficits are not the only cause for concern—the New Deal package is filled with thorns for the poor. The programs that many civil rights leaders favor have had a very poor track record. Thus, numerous studies indicate that the quickest way to end the huge black youth unemployment that Urban League president Vernon Jordan considers the single most serious probem of black Americans is to repeal all minimum wage laws. But in most liberal quarters, any such proposal is sacrilegious.

Study after study reveals that government regulation is a major enemy of the poor. No matter how well intended and desirable in theory, government regulation in practice generally fails this group. Regrettably, the examples keep piling up. Thus a recent study shows that the federal program to increase the employment of blacks—a basic civil rights effort—is not achieving its purpose.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, sex or national origin. Its coverage is extensive. Prior to 1972, this law applied to firms with 25 or more employees, in that year it was amended to apply to those with 15 or more employees. The statute seeks to eliminate discrimination in the labor market by controlling both a firm's employment and wage practices. The law's provisions relating to employment bans hiring practices that limit the access of minorities to firms and occupations. Its wage provisions declares illegal all pay differences based on race.

In the current issue of The Journal of Law and Economics. Andrea H. Beller of the Institute for Independent Studies of Radcliffe College writes that an inherent conflict exists between these two provisions. On the one hand, by increasing black

wages relative to white wages, the wage provision induces firms to decrease black employment. On the other hand, the employment provision requires firms to increase their black to white employment ratio and therefore to hire more black workers.

The wage provision requires firms to pay blacks and whites equally for the same work. An integrated firm that pays blacks less must increase their wages. Beller asserts that this increase in labor costs leads to substituting white workers and/or causes firms to contract the size of their operations, thereby also reducing black employment.

According to Ms. Beller, an analysis of the law's results during the 1960s show that the wage provisions counteracted the benefits of the employment provisions so that Title VII was not helping minorities. Beller suggests that enforcing these laws actually may make the minority group worse off. She found that the effects of the wage provisions were stronger than those of the employment requirements leading to a small reduction in relative black employment and wages. The researcher concludes, therefore, that the enforcement of Title VII as a means to combat discrimination, "must be characterized as unsuccessful during the sixties."

Nevertheless, this law has probably caused significant upheaval in industrial practices in this country as firms seek to avoid the extra costs imposed by the law. A company might alter its operations and even its location to minimize the law's impact. Beller explains that the employment provisions require covered firms to attain certain proportions of black to white workers, depending on location and occupation. To offset the increased cost that the law causes, firms might migrate into states or counties with lower proportions of blacks in the labor force, substitute machinery for workers, or change the mix of occupations to favor those with relatively few blacks. In making such changes, firms risk being penalized for violating the law.

All of this maneuvering is likely to raise the cost of doing business and therefore the price of products. Any increase in prices is most harmful to those with the least amount of spendable income. Thus, Title VII joins the long list of government programs whose principal accomplishment is the imposition of higher prices and the acceleration of inflation.

[The following material was subsequently supplied by the nominee for the record:]

My *Register* column of January 28, 1978, discussed a paper written by Andrea H. Beller published in the October 1978 issue of "Journal of Law and Economics" (pp. 359–380). Ms. Beller was at the time on the staff of the Institute for Independent Study, Radcliffe College. The title of the article is "The Economics of Enforcement of an Antidiscrimination Law: Title VII of the Civil Rights Act of 1964."

Ms. Beller's paper was based on her Ph.D. dissertation submitted to the Department of Economics, Columbia University, 1974. Her research was initially supported by dissertation fellowships from the Ford Foundation and the American Association of University Women. Much of the material in the paper was prepared for the Manpower Administration, U.S. Department of Labor, under a grant. Further support came from funds granted to the Institute for Research on Poverty at the University of Wisconsin-Madison by the Department of Health, Education, and Welfare pursuant to the Economic Opportunity Act of 1964.

The "Journal of Law and Economics" is published by the University of Chicago Law School and is generally regarded as a highly prestigious and selective academic journal.

Thus, as was my practice throughout my 5 years' experience as a newspaper columnist, I discussed in my column an article worthy of attention and study. I thought it an important article in an area of great concern to the nation. For the information of the U.S. Senate I have attached a copy of the article.

Ms. Beller's conclusion of her study appears on page 378, and is as follows:

"An inherent conflict makes it difficult, if not impossible, for equal employment opportunity laws to eliminate both employment and wage discrimination simultaneously. Complying with the laws' wage provision sets up an incentive for competitive firms to reduce relative employment, but complying with the employment provision requires them to increase it. Because of this conflict, enforcing these laws may make the minority group even worse off.

"Title VII's overall effects on the relative economic position of black males closely and consistently approximate the combined effects of its employment and wage provisions. Enforcing the employment provision increased both relative black employment and wages, while enforcing the wage provision decreased them; furthermore, during the period from 1960 to 1970, the effects of the wage provision were stronger. The enforcement of Title VII as a means to combat racial discrimination must be characterized as unsuccessful during the sixties, for the combined effect of its provisions was to reduce, albeit insignificantly, relative black employment and wages."

My conclusion that a principal accomplishment of the law "is the imposition of higher prices and the acceleration of inflation" is based on the foregoing paragraphs and other parts of the Beller paper. I quote from my column:

"Nevertheless, [despite the absence of benefits] this law has probably caused significant upheaval in industrial practices in this country as firms seek to avoid the extra costs imposed by the law. A company might alter its operations and even its location to minimize the law's impact. Beller explains that the employment provisions require covered firms to attain certain proportions of black to white workers depending on location and occupation. To offset the increased cost that the law causes, firms might migrate into states or counties with lower proportions of blacks in the labor force, substitute machinery for workers, or change the mix of occupations to favor those with relatively few blacks. In making such changes firms risk being penalized for violating the law."

Although obviously well intended the law was creating problems for the people it was supposed to benefit. As I said in my column, "any increase in prices is most harmful to those with the least amount of spendable income."

Columns of this character are in the best tradition of a free and open press. A free society requires that the public know how the nation's laws are operating. Lawmakers should be most concerned about the effectiveness and consequences of the laws they pass. My column served well both purposes.

Senator METZENBAUM. Professor, it is ironic that while many conservatives argue for judicial restraint, you argue for selective judicial activism. You would like to see the Court strike down laws which protect unions and which require minimum wages.

You say that, quote, "A strong case can be made that on many issues Congress and State legislatures do not reflect the views of their constituents." You go on to say that, quote, "Numerous critical provisions of statutes do not represent or are contrary to majoritarian will"; that "these problems are compounded by problems of competency"; that "many legislators do not have the knowledge, understanding, incentive, or time to create efficient and effective statutes."

Does that not sound like you are saying that the Congress is not smart enough to make the laws so we, the judges, have to do it?

Mr. SIEGAN. I would never say that one branch of government has more knowledge than another branch of government. The branches of government differ by objective. What is their objective?

The Congress is there to pass the laws, and I think I do not have to tell you it does not always do a good job. Think of the Congress passing laws limiting speech or limiting religion or limiting press, and that happens; we have lots of cases.

And we come back and we say, well, we cannot really expect Congress to be perfect and we want the courts to do something about that. What I have written there is nothing unusual as support for a three-branch government.

We need Congress. I am not here to tell you we want to get rid of Congress. Yet, it at times does not act in the best public interest and deprives people of rights—speech rights, property rights. I think that should be pointed out to those who look at why we have judicial review.

My answer to protect the individual against government excess—arbitrary, capricious government—is to give power to the judiciary to declare those laws unconstitutional, and I say that with respect to all liberties.

I do not value one liberty as against another. It is totally untrue that I adhere to any such policy.

Senator METZENBAUM. We are not talking about a liberty. We are talking about you are saying that a strong case can be made that we in the Congress do not reflect the views of our constituents. As a part of the democratic process, we submit ourselves to be elected or defeated.

Then you go on to say that we act contrary to majoritarian will, and then you give us the coup de grace by making it quite clear that you do not think we have got any brains, we do not have any understanding and incentive or time to create efficient or effective statutes.

Now, that might be true about my colleague on my left here, but not the rest of us. [Laughter.]

Mr. SIEGAN. Well, it certainly was true when the Republicans controlled the Senate. Would you not say that?

Senator METZENBAUM. Well, let me say this: You have been critical of the judicial developments in so many fundamental areas of the law—racial equality, voting rights, gender equality, economic regulation.

Frankly, I am concerned that if you are confirmed you will find ways to implement your views. The circuit courts are critical to the interpretation of Federal statutes and the Constitution. The Supreme Court can review very few cases on the merits and the circuit courts are, for all practical purposes, courts of last resort. It is a great risk to our system of justice to confirm someone who disagrees with so much which is fundamental to American constitutional law.

I am frank to say to you that I will look over your record carefully, but I have grave doubts about your approach to the law and almost your air of superiority in approaching the interpretation of laws which have been enacted by State legislatures or Congress. We will take another look at it and there will be further hearings on this.

Mr. SIEGAN. May I reply to that, Senator?

Senator METZENBAUM. Certainly.

Mr. SIEGAN. In the first place, I support strongly many of the Supreme Court decisions, the important decisions of the Supreme Court, probably most of the important decisions. You are talking about decisions I differ with.

I do not know anybody, including you, who likes everything the Supreme Court does and makes no objection. I do not think I am much different than the average scholar who looks at Supreme Court cases and studies them.

I go over these cases with a very fine-toothed comb and then look at the history and some instances I come back and report to you I do not think history supports that, period. In my first chapter I say *McCulloch* v. *Maryland* was wrongly decided. That is even quoting Thomas Jefferson, who said the same thing. That is the case there.

But I have a list for you, Senator, of all the cases—the major cases in this country—that I strongly support, and I assure you if I wrote a book on them the book would be bigger than this.

I, as a scholar, am favorable at times; I am unfavorable at times to Supreme Court opinions. It is going to happen all the time. What I want to assure you of, though, is I recognize this and I recognize that as a judge I am out of the pleasurable activity of just

calling them as I see them on the basis of the way I want. I have to call them as I see them strictly on the basis of what the Supreme Court wants.

So I again want to say I very much respect the institution; I think it is a great institution. It has personally done marvelous things for me. I am someone who is dependent upon speech, upon press, upon religion.

I teach, I speak, I write, I am an academic. The freedoms of the first amendment are extremely dear to me. They have allowed me to write books which lots of people do not like.

I am Jewish. The religious freedom provisions protect me, and as an individual I like my privacy, and the privacy guarantees of the Constitution protect me on that score.

Senator METZENBAUM. Professor, I appreciate your testimony and I feel that you are sincere, that you are candid, and that you take your position and are prepared to hold forth on it. There is no question that you have picked up along the way a considerable amount of opposition. Just how much of that opposition will be reflected in the Senate vote, I cannot tell you, but I appreciate your coming before us and I think you have been quite candid in your responses.

Senator Hatch said he had a couple of more questions. We were scheduled to shut down at 12:30, but for another 5 minutes I yield to my colleague.

Senator HATCH. Yes. If you will give me just a little bit longer here, I would like to read a letter written by Professor Phil Kurland of the University of Chicago Law School. Now, Professor Kurland testified against Judge Bork, and I have to admit that was a very serious thing, I thought.

But this is written to Senator Joseph Biden. He said:

> Dear Senator, Professor Bernard Siegan has been nominated for an appointment to the Court of Appeals for the Ninth Circuit and will appear before the Judiciary Committee shortly for its advice and consent. I have known Siegan for many years and wish to vouch for him. I need not share his jurisprudential outlook to be able to assure you that he is in the mainstream of legal thought, not given to crusades for wholesale revision of Constitutional doctrine, thoroughly wedded to Anglo-American principles of stare decisis, and recognizes that the role of the intermediate appellate judge is to keep the trial courts in line with their and his masters' voices, those of the Supreme Court.
>
> Like others who already serve on the Federal bench, he is not unaware of economic elements in contemporary jurisprudence, but I do not think he would abdicate the role of the courts to the control of the marketplace and I think he would, if he could, expand the area of individual rights, but within the confines created for him by the court.

"I am certain"—and this is a very important sentence; in fact, these next three sentences are very important—"I am certain that he is not contaminated by any prejudice based on race, creed, color or gender. In sum, he is a conservative scholar learned in the law and prepared to serve it in the tradition of Jackson and Harlan. I commend him to you. Sincerely, Philip B. Kurland."

Now, just two questions and I think we will finish. Senator Grassley probed your views on economic liberties and the Constitution. Senator Heflin explored your views on equal protection. Senator Metzenbaum, of course, inquired about Supreme Court law; I have done that, too.

We have all asked the same question, but maybe we could ask it—we have asked it in different ways, but basically the same question and maybe I could just ask it one more time. If you were faced with a case involving any of these issues while a ninth circuit court judge, will you decide that case in accordance with the Supreme Court's doctrines or according to your own past academic thinking and writings?

Mr. SIEGAN. According to the Supreme Court precedent, without question, without qualification, without reservation.

Senator HATCH. And I think everybody here who has heard your testimony believes that, and I think that is important. Now, can you think of any case where you would rely upon your own studies rather than follow Supreme Court doctrine?

Mr. SIEGAN. No, sir.

Senator HATCH. Is it fair to say that Judge Siegan would never be out in front of the Supreme Court?

Mr. SIEGAN. Yes, sir.

Senator HATCH. That is fair to say?

Mr. SIEGAN Yes, sir.

Senator HATCH. Many of your potential colleagues have differed with that. As I mentioned before, in one year 27 out of 28 decisions of the Supreme Court reversed the Ninth Circuit Court of Appeals. And, frankly, it would be correct that you would not be a party to that, just doing what you want to do because only 27 or 28 cases are going to be heard by the Supreme Court from that circuit even though hundreds of cases, maybe thousands of cases, are actually decided by that very large circuit court of appeals?

Mr. SIEGAN. Yes.

Senator HATCH. Is it fair to say that you will not be part of that?

Mr. SIEGAN. Yes, sir.

Senator HATCH. Okay. Now, you said an organized society will, quote, "frequently be required to enforce laws that are not accurate or correct," unquote. If I understand what you really meant, it would be that laws may not be read the same today as they were read in past history. Now, is that what you meant by, quote, "accurate or correct," unquote, laws that we enforce today?

Mr. SIEGAN. I cannot be sure of the quote, but if that is what you tell me——

Senator HATCH. That is how I recall it.

Mr. SIEGAN. But I do not know the context. If you tell me that there is room for expansion in equal protection, due process, yes, certainly. As time goes on, different interpretations have to be given in accordance with the wisdom of the day.

Senator HATCH. I just wanted to clarify that. And then finally, Mr. Chairman, I would like to submit questions from Senator Thurmond in writing for you to answer as soon as you can, if you will.

Thank you, Mr. Chairman. I appreciate it.

Senator METZENBAUM. We will keep the record open not only for Senator Thurmond's questions to be answered but in case other members of the committee have questions as well.

[Questions and answers follow:]

JOSEPH R. BIDEN, Jr., DELAWARE, CHAIRMAN
EDWARD M. KENNEDY, MASSACHUSETTS
ROBERT C. BYRD, WEST VIRGINIA
HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZONA
PATRICK J. LEAHY, VERMONT
HOWELL HEFLIN, ALABAMA
PAUL SIMON, ILLINOIS
STROM THURMOND, SOUTH CAROLINA
ORRIN G. HATCH, UTAH
ALAN K. SIMPSON, WYOMING
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
GORDON J. HUMPHREY, NEW HAMPSHIRE
MARK H. GITENSTEIN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
TERRY L. WOOTEN, MINORITY CHIEF COUNSEL
R.J. DUKE SHORT, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 18, 1988

Mr. Bernard H. Siegan
University of San Diego
School of Law
Alcala Park
San Diego, CA 92110

Dear Mr. Siegan:

At the hearing held on February 25 on your nomination to be United States Circuit Judge, you indicated that you would provide further information for the record on two points. Since the Judiciary Committee has not received any additional submissions from you since the hearing, I am writing to call these matters to your attention.

First, I asked at the hearing whether you had participated in any cases before the Ninth Circuit Court of Appeals. You replied that you had probably participated in one such case, the Petaluma case, and said that you would provide the citation. This exchange appears on pages 35-36 of the unedited hearing transcript, which the Committee has provided to you.

Second, I asked for your comments on an article which appeared in the New York Times on January 29, 1988, which included observations by Judge Frank Coffin and other federal judges on the question of precedent. You replied that you were familiar with the article, and that you would give the Committee your reaction to it. This exchange appears on pages 76-78 of the hearing transcript. For your convenience, I enclose a copy of the article in question.

The Committee has also received, and has included in the hearing record, a letter from former Judge Shirley Hufstedler which addresses the same issues discussed in the New York Times article. You may wish to include your reaction to this letter in your response to the article. I enclose a copy.

I also enclose several written questions submitted by members of the Judiciary Committee, and ask that you respond to them in writing in order to supplement the hearing record.

Finally, in order to supplement the hearing record on your litigation experience, please describe briefly any cases in which you have participated in any appellate court, state or federal, by filing a brief or offering oral argument. Please include the caption of the case, and, if the appellate decision has been reported, the citation. Your response need not duplicate any information you provided in response to the Committee's questionnaire, nor in response to my inquiry about the Petaluma case.

Thank you in advance for your prompt attention to these requests.

Sincerely,

Patrick Leahy

PATRICK LEAHY
United States Senator

enclosures

Hufstedler
Miller
Carlson &
Beardsley

February 17, 1988

Honorable Joseph Biden, Jr.
United States Senate
S.H. 703
Second Street and Constitution Avenue
Washington, D.C. 20510-6275

In Re: Nomination of Mr. Bernard H. Siegan

Dear Senator Biden:

I write in opposition to the confirmation of Mr. Siegan as judge of the United States Court of Appeals for the Ninth Circuit.

I do not know Mr. Siegan personally. My acquaintance with him is limited to my reading substantial parts of his published works, his testimony before the Senate Judiciary Committee, and the responses to the Questionnaire for Judicial Nominees. From those sources, I have formed the opinion that Mr. Siegan is not qualified to sit on the United States Court of Appeals.

During his years of private practice, Mr. Siegan specialized in land development. His litigation experience, even in the area of his specialty, was extremely modest. He did not participate in any federal litigation, with the exception of one appearance in a federal court when he worked for a law firm shortly after leaving law school. He did not further describe the occasion, but, by his own account, his appearance in federal court was not "of any significance" (R.T. 32). The last time he appeared in a federal court was "possibly" 36 years ago. (Ibid.) He has never been admitted to practice in any federal appellate court.

Nothing in Mr. Siegan's record suggests that, before his nomination, he had any interest in the work of the United States Courts of Appeals. His interest in litigation has been minimal. Instead, the record indicates very strongly that he is not acquainted with the docket of the Ninth Circuit, the responsibilities of a judge of that Court, or the fields of law in which that Court regularly adjudicates. Mr. Siegan's interests, throughout his career, have been in land development, zoning, some aspects of economics, and his philosophical views of some of the decisions of the United States Supreme Court.

Mr. Siegan has testified before the Committee that his "thinking is totally irrelevant" to the decisions that he would make as a judge. (R.T. 60). As a United States Circuit Judge, he would look at the fact situation before me and look up the cases and try to decide how the Supreme Court would hold in a particular case. The purpose here as an appeals court judges [sic] is to carry out the will of the Supreme Court and ...." (R.T. 60-61). "If a case comes up involving economic liberties, I think as a judge I would feel it is my obligation to say that is not protected here; there is nothing I can do for you. If you need help, go see the legislature." (R.T. 70-71.)

In discussing how he would approach a case involving legislation concerning the safety of underground miners, Mr. Siegan responded:

> "I would, as a legal researcher, as a legal analyst, look to what the Supreme Court has said in that particular situation.... I would try to write an opinion that would be upheld by the U.S. Supreme Court.... Appeals Court judges ... basically have to be consistent with what the Supreme Court says. So what purpose would it be for an appeals court judge to write an opinion which will be thrown out by the Supreme Court? Now, it is true not all the cases come up to the Supreme Court, but many of them do.... I would not dream of imposing my will over that of the U.S. Supreme Court." (R.T.71-72)

These responses clearly indicate that Mr. Siegan does not understand judicial opinion writing and the reality of Supreme Court review of decisions from Courts of Appeals. The Supreme Court grants hearings in fewer than two percent of the

cases decided by all the Courts of Appeals combined. Very few cases in the Ninth Circuit can be resolved by finding a similar set of facts in a Supreme Court case and following the holding in that case. The bulk of the docket is made up of cases presenting far more vexing problems, requiring the application of legal principles drawn from many cases, none of which presents the same factual picture or the identical issue upon which the Supreme Court has spoken.

Except in the field of criminal law and procedure, the cases before the Ninth Circuit usually concern questions upon which the Supreme Court has not spoken at all or has spoken only indirectly. As a judge, Mr. Siegan could not find the "answers" to the innumerable hard questions before the Ninth Circuit solely from examining Supreme Court authority, or prior decisions of the Ninth Circuit, or explicit directions in the legislative history, although all of such sources are regularly consulted. Although all judges of the Ninth Circuit must follow the law as decided by the Supreme Court, that task is the least difficult. (Indeed, very few civil cases are even appealed if the Supreme Court has clearly decided the dispositive issue.)

Mr. Siegan has not indicated any awareness of the cases reaching the Court of Appeals from Federal District Courts based on diversity jurisidiction. In those cases, the law of the States must be applied. The Supreme Court does not speak at all on state law unless the state law is subject to constitutional challenge.

The overwhelming majority of cases on the docket of the Ninth Circuit do not involve the subjects in which Mr. Siegan has had any experience. Almost half the caseload is criminal. Mr. Siegan has had no revealed interest and no experience in criminal jurisprudence. Cases involving issues of land development are a very small (even infinitesimal) part of the docket. The fields of law considered by the Ninth Circuit are extraordinarily varied and often very complex. Nevertheless, federal jurisdiction and procedure, and errors in trials are intimately and constantly before the Court. Mr. Siegan's work, both as a practitioner and a law teacher has had nothing to do with these subjects.

When Mr. Siegan states that his economic, social, judicial and political philosophy would not be relevant to his work as a circuit judge, he has revealed his lack of appreciation of the work of a circuit judge. The Ninth Circuit is constantly interpreting federal legislation; it is rare that such legislation has no economic effect on both public and private interests.

Interpretation and application of federal statutes does not rest alone on the language of its legislative history and Supreme Court decisions. Rather, the Ninth Circuit must frequently decide legislative intent when that intent has not been clearly expressed or when Congress did not contemplate the circumstances in which the legislation must be applied and when the Supreme Court has said nothing about the statute. The individual's philosophy inevitably influences his or her decision to read the legislation expansively or restrictively in applying that legislation to particular facts. Mr. Siegan has expressed strong views that, on "socioeconomic matters," statutes that do not represent majoritarian will are illegitimate, that legislators do not have enough knowledge "to create efficient and effective statutes," and that these deficiencies in legislative process warrant denial of judicial deference to the legislative will. He would shift to the Government a heavier burden of proof to uphold statutes affecting economic interests than has been acceptable for more than fifty years. (Siegan, Economic Liberties in the Constitution, 315-331 (1980).)

Throughout his published works, Mr. Siegan has consistently elevated private economic interests above the public interests in environment, health and safety, aesthetic concerns and other competing social interests. His "libertarian" philosophy is a radical departure from very well established principles of law stated by the Supreme Court and by the Ninth Circuit over a period of many decades.

Mr. Siegan's views on civil rights issues are also extreme. He declines to accept that the draftsmen of civil rights statutes and of the Fourteenth Amendment deliberately adopted capacious, abstract language to permit the concepts of protected human rights to develop over time. Apparently recognizing that his crabbed interpretation of the Fourteenth Amendments and of the Civil Rights Acts would illegitimate Brown v. Board of Education, he has expressed to this Committee the extraordinary view that dismantling racial apartheid, while unsupportable under the Fourteenth Amendment, could be sustained by the constitutional right to travel. His shrinkage of the reach of the Equal Protection Clause and his expansion of a constitutional right of travel are bizarre. Not only does he disagree with the interpretation of the Equal Protection Clause endorsed by the Supreme Court and by an overwhelming majority of constitutional scholars, he has failed to explain how he can reconcile his interpretation of the Equal Protection Clause with his expansive acceptance of a constitutional right of travel. A right to travel does not expressly appear in the Constitution.

Does Mr. Siegan believe that protecting voting rights depends on a constitutional right to travel to the polls?

As the Committee knows, a circuit judge is simply not one among many judges on a large collegial court. Circuit courts sit in panels of three judges, with occasional exceptions for hearings en banc. Again and again, his vote would be the decisive vote on a 3-judge panel, and 98 percent of the time that decision will be final, not only as to the litigants in that case, but to innumerable persons who will be bound by the law in that case who are not parties.

Mr. Siegan has enjoyed success as an academic philosopher, a real estate owner and developer. Unfortunately, neither his training nor his experience has prepared him for the tasks that face a circuit judge.

Sincerely,

Shirley M. Hufstedler

SMH:sh
cc: Honorable Edward Kennedy

QUESTIONS ON BROWN V. BOARD OF EDUCATION

At the hearing last November, Senator Humphrey asked you about your views on the landmark case of Brown v. Board of Education. The following questions arise from your answer to Senator Humphrey, and from your discussion of this question in your book, The Supreme Court's Constitution.

1. The Supreme Court struck down school segregation laws in 1954 because it concluded that these laws denied blacks equal protection of the laws. As I understand it, you agree with the result, but not with the reason. You argue that school segregation denied black children a "natural and fundamental right" which you call the "right of access," and which you say is part of the constitutional right to travel. Does this mean that you don't think that school segregation laws are a denial of equal protection of the law, as the Supreme Court decided, but instead are a violation of another constitutional protection?

2. The Supreme Court rested its decision in Brown on the conclusion that "separate" schools were inherently "unequal." Do you agree with this conclusion? If so, is it relevant to your analysis of the correct rationale for Brown I? Would the black children's "right of access" to the white-only schools be any different if the "separate" schools for blacks really were

"equal" in terms of facilities, quality, convenience, and so forth?

3. Please identify the constitutional source of the "right of access," which you argue should have been the rationale for the Brown I decision.

4. You wrote in your book, at page 106, that "this right [of access] protects a person's opportunity to pursue happiness and well-being through free access to places and areas throughout the nation." Are there any limitations on this constitutional right? Does every American have a constitutional right of access to every place and area in the country?

5. You wrote in your book that the issue in the Brown case under your analysis is whether there was a "sufficient justification" for denying black children the "right of access" to the public schools. What standard should the Court have applied in determining whether there was a "sufficient justification" for excluding blacks from the white schools? Should it have employed a subjective or an objective test?

6. You wrote in The Supreme Court's Constitution that the denial of the right to access in the school segregation case could not be justified because it was based on "prejudicial attitudes or feelings." In your view, is this analysis equally

applicable to "prejudicial attitudes and feelings" not based on race? Would prejudice against any group be an insufficient justification for denial of the right of access?

7. Since you agree with the result in Brown I, what practical difference would it have made if the Supreme Court had adopted your "right of access" rationale, rather than the reasoning actually used to decide the case?

QUESTIONS ON ECONOMIC REGULATION

You have argued, in your book, Economic Liberties and the Constitution, and in other writings, that the Constitution demands that the courts look much more closely at regulatory legislation. On page 324 of your book, you advocate that the courts should apply the following standard in constitutional review of regulatory legislation:

> The government would have the burden of persuading a court using an intermediate standard of scrutiny, first, that the legislation serves important governmental objectives; second, that the restraint imposed by government is substantially related to achievement of these objectives...; and third, that a similar result cannot be achieved by a less drastic means.

8. This proposed standard would reverse the burden of proof that is currently applied in constitutional challenges to economic regulation statutes. In your view, what constitutional provision requires the reversal of the burden of proof in such cases?

9. In your writings, you have been highly critical of the legislative process in the field of economic regulation. Is this one of the reasons why you think the courts should not show as much deference to legislative decisions as they now do in this field?

10. In your writings, you have often made the point that legislators are usually not experts in the fields about which they legislate. For example, on page 274 of Economic Liberties and the Constitution, you wrote:

> Under our system, a legislature is charged with implementing the public's political will. To fulfill this obligation, a lawmaker must be able to comprehend well both the social problems and the legal means for coping with them.... For a number of reasons, these responsibilities are frequently beyond most legislators' ability and capacity. To vote intelligently on proposed statutes demands reasonably expert knowledge of the subject matter, which few legislators possess about a great portion of measures they consider....Legislators lack the time, and probably also the will and inclination, to become very knowledgeable.

Should the relative expertise of legislators be a factor in a court's determination, either of the meaning of a disputed provision of legislation, or of the constitutionality of legislation, in the economic regulation field?

11. You have raised another criticism of the legislative process: that most laws are the result of compromises. On pages 276-77 of Economic Liberties and the Constitution, you wrote the following:

> Politics is said to be the art of the possible, and here the possible means continuous compromise. This ingredient also severely retards the effectiveness of the political process. Assuming the Perfect Plan is introduced in the legislature, it is likely to be quite imperfect by the

time it clears public hearings, committee, and floor votes. Sometimes the situation can be compared to surgery conducted by a team composed of Christian Scientists, exorcists, and surgeons.

Should a court's decision on the meaning or the constitutionality of a regulatory statute be influenced by whether or not the statute was the product of a compromise?

12. Part of your criticism of the legislative process is directed at those who empower the legislators: the voters. Your chapter entitled "Limitations and Infirmities of Legislative Processes" devotes several pages to a discussion of what you call "the irrational and erratic nature of the popular franchise." You point out that many people don't vote; many voters are not knowledgeable about the issues; a candidate's success often depends on irrelevant factors like speaking ability or good looks.

What relevance should these considerations have to the degree of deference that a judge should give to legislative decisions in the field of economic regulation?

13. You develop many of the same criticisms in an article entitled "Land Use Planning in Ameriça," in the Environmental Law Journal. There you conclude: "The simple, yet highly profound answer, is that public land use planning is doomed to failure in a representative society." You repeat these criticisms in your book on the general topic of regulatory

legislation. Do you still believe that "public land use planning is "doomed to failure in a representative society"? Do you reach the same conclusion about other types of regulatory legislation?

ADDITIONAL QUESTIONS ON NOMINATIONS PROCESS

During a discussion sponsored by the Federalist Society of Duke University Law School on February 17, 1988, Assistant Attorney General Stephen Markman indicated that officials of the Justice Department had had "extensive discussions" with you concerning the views you expressed in your writings. Please answer the following questions regarding these discussions and the process by which you were selected:

14. Please list all interviews or communications you had with the White House staff or the Justice Department regarding your nomination and the dates of such interviews or communications, and identify all persons present or participating in such interviews or communications.

15. Please identify each communication you had from January 1, 1985 through the date of your nomination with any member of the White House staff or the Justice Department referring or relating to your views on any case, legal issue or question that could come before the United States Court of Appeals for the Ninth Circuit; state who was present and who participated in such communication; and describe fully what transpired. Please include within your response to this question any communication relating to your published writings.

JOSEPH R BIDEN JR DELAWARE CHAIRMAN
EDWARD M KENNEDY MASSACHUSETTS
ROBERT C BYRD WEST VIRGINIA
HOWARD M METZENBAUM OHIO
DENNIS DECONCINI ARIZONA
PATRICK J LEAHY VERMONT
HOWELL HEFLIN ALABAMA
PAUL SIMON ILLINOIS
STROM THURMOND SOUTH CAROLINA
ORRIN G HATCH UTAH
ALAN K SIMPSON WYOMING
CHARLES E GRASSLEY IOWA
ARLEN SPECTER PENNSYLVANIA
GORDON J HUMPHREY NEW HAMPSHIRE
MARK H GITENSTEIN CHIEF COUNSEL
DIANA HUFFMAN STAFF DIRECTOR
TERRY L WOOTEN MINORITY CHIEF COUNSEL
BJ BUKI SHORT MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 16, 1988

Hon. Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

I am writing to request that you forward the following written question for response by Bernard Siegan, nominee to the United States Court of Appeals for the Ninth Circuit:

Professor Siegan, in reviewing your testimony, I note that you have repeatedly asked the Committee to disregard your views as you have expressed them in your writings over the years. You have testified that your views should be irrelevant, since you would follow Supreme Court precedent if you are confirmed.

I believe a nominee's views about legal matters will in some measure affect decisions a nominee makes as a judge. The reason is that judges inevitably have leeway. They must fill in the gaps in the law and must resolve ambiguities about what the law is, and in doing so a judge inevitably draws upon his or her starting point views and outlook. A nominee who asserts he or she will follow the law is ignoring the fact that the law to be followed is often not clear, and that judicial decisions are often affected by a judge's individual legal views. Please comment.

Thank you for your consideration.

My best wishes.

Cordially,

Paul Simon

Paul Simon
U.S. Senator

RESPONSE OF BERNARD H. SIEGAN
TO QUESTIONS FROM THE SENATE JUDICIARY COMMITTEE
FOLLOWING THE FEBRUARY 25, 1988 HEARING

A. During the hearing, I offered to provide additional information on three points and attached those additional submissions to the copy of the transcript that I returned to the Committee shortly after it was sent to me for review. For your convenience, I have enclosed copies of those additional submissions.

B. Comments on the letter of Shirley M. Hufstedler

Mrs. Hufstedler begins by asserting that she does not know me personally. This is true; to the best of my knowledge we have not met. I think it is significant to point out that the Committee has received over fifty letters from people who do know me personally. Without exception, they support my nomination. Some of them, such as former Chief Justice Warren E. Burger, Professor Phil Kurland, and Professor Charles Allen Wright, speak with great authority on constitutional law and also know me well enough to assess both my academic work and my suitability for the bench. It is also true that <u>none</u> of the people who wrote in opposition to my nomination know me personally. I understand that confirmation hearings are designed to give the Committee an opportunity to meet

judicial nominees and in particular to evaluate them personally -- to assess their temperament and character, as well as their legal expertise. To the extent that the Committee values first hand evaluations of a nominee's judicial temperament and probity, I hope that you will put into proper perspective the adverse comments of people whose sole knowledge of what kind of judge I would be is derived from a reading (and often a misreading) of some of my books.

In her emphasis on the importance of litigation experience for an appellate judge, Mrs. Hufstedler displays a viewpoint that arises, no doubt, from her own extensive experience as a litigator. I would like to point out, however, that an academic background is an equally viable tradition from which to select appellate judges and arguably is even more relevant to the work of an appellate jurist, who relies more on his or her research and writing ability than advocacy skills. A number of distinguished jurists had only minimal litigation experience before being appointed to the bench, including Associate Justice William O. Douglas and Circuit Court Judges Ruth Ginsberg and Patricia Wald, to name just a few.

As I stated repeatedly in the course of two hear-

ings, my understanding of the role of a judge is that it is obligatory to set aside one's personal views and to decide cases on the basis of what the law requires. Where the law is unclear, my task as an appellate judge would be to decide the case fairly and impartially, based on a careful scrutiny of the law and of the closest available precedents, to the best of my ability. Mrs. Hufstedler's letter questions my understanding of the role of an appellate judge and my capacity to do what I describe. I would like to point out that she has no basis for asserting that I am unable or unwilling to act in accord with my commitment. I have the reputation of being a person of integrity and I assure the Committee that if I am confirmed, I mean to do exactly as I say. As far as lack of experience in criminal matters is concerned, judges who come to the federal bench from an academic or civil litigation background routinely avail themselves of the help provided by the Federal Judicial Center and by other judges on the court they are about to join. I would be no exception and if I am confirmed, I will quickly be able to bring myself up to speed in the area of criminal law.

For me, the most disturbing portion of Mrs. Hufstedler's letter is her assessment of my views on civil rights issues, which quite simply is wrong. I am a

strong supporter of the advances that have been made in civil rights in this country. In my writing as an academic, I have looked for ways to expand the availability of housing to the poor and minorities. My work in this area has been distributed by The National Urban Coalition and The Potomac Institute's Metropolitan Housing Program and led to a groundbreaking report of the President's Commission on Housing in 1982. However, in the course of my scholarly research, I have read virtually all of the literature and records of the debates that preceded enactment of the 14th amendment and my writing reflects what I understand to be true about the intentions of those legislators, whose sensitivities, in the 1860's, were not the same as ours are today. I do not believe that their view of racial matters was correct and I certainly feel that laws should be changed to reflect evolving social values, but in my academic writing I attempted to describe history accurately, which is the task of a scholar.

Finally, Mrs. Hufstedler apparently misunderstands my position on Brown v. Board of Education. First and most importantly, I believe that the Court reached the correct results in Brown. Had I been writing the opinion, however, I would probably have used a different line of reasoning to justify the decision. I think that

segregated schools deny black children the constitutional right of access to public schools of their choice, and in my response to Senator Leahy's question #3 (see below), I explain my legal reasoning in some detail. And as I point out in response to question #7, the practical effect is nil. At the present time, the right of access, which is derived from the right to travel, is a developing area of the law and my thesis, as far as I know, is original. But in the context of my judicial confirmation, it is important to note that I have been nominated to a court where decisions are based on precedent and theoretical academic creativity will necessarily be curtailed by the obligations of stare decisis.

C. Questions on Brown v. Board of Education

1. The Supreme Court struck down school desegregation laws in 1954 because it concluded that these laws denied blacks equal protection of the laws. As I understand it, you agree with the result, but not with the reason. You argue that school desegregation denied black children a "natural and fundamental right" which you call the "right of access," and which you say is part of the constitutional right to travel. Does this mean that you don't think that school segregation laws are a denial of equal protection of the law, as the Supreme Court decided, but instead are a violation of another constitutional protection?

A. Now, more than 30 years after the Brown decision, the law is clear and unambiguous: school segregation laws are a denial of equal protection of the law. In 1954, however, the legal guidelines were (1) what the framers

of the 14th Amendment intended it to mean when they wrote it and, (2) existing interpretations of that intent. My research indicates that in 1866, the framers of Section 1 did not regard legally segregated schools as violating the equal protection provision. However, I believe that when Brown was decided, segregated schooling denied black children the constitutional right of access to public schools of their choice.

2. The Supreme Court rested its decision in Brown on the conclusion that "separate" schools were inherently "unequal." Do you agree with this conclusion? If so, is it relevant to your analysis of the correct rationale for Brown I? Would the black children's "right of access" to the white-only schools be any different if the "separate" schools for blacks really were "equal" in terms of facilities, quality, convenience, and so forth?

A. Yes, I agree that racially "separate" schools are inherently "unequal." However, the right of access is not dependent on this conclusion. In seeking access to a public school from which they were excluded solely because of their race, black children were trying to exercise a liberty of importance to them and their parents. It does not make a difference, with regard to this liberty, whether the separate schools provided for blacks were in fact equivalent to the white schools in terms of facilities, quality, convenience and so forth.

3. Please identify the constitutional source of the "right of access," which you argue should have been the rationale for the Brown I decision.

A. The right of access is an essential component of the right to travel, which was identified early in the history of constitutional law as a natural and fundamental right. Justice Bushrod Washington first described it in 1823 in the famous Cornfield v. Coryell opinion, 6 Cas. 546 (C.C.E.D. Pa 1923)(No. 3,230) ("The right of a citizen of one state to pass through or to reside in any other state, for purposes of trade, agriculture, professional pursuits or otherwise"). In the opinion, Justice Washington enumerated natural rights which he regarded as protected under the privileges and immunities clause of Article IV. The evidence is most persuasive that the Thirty-Ninth Congress sought to safeguard all these rights in the Fourteenth Amendment.

Freedom of travel has been variously described as a basic right under the Constitution, United States v. Guest, 383 U.S. 745, 757-58 (1966); an element of the "liberty" secured by the due process clause, Kent v. Dulles, 357 U.S. 116, 125-26 (1958), and as among those natural rights "which of right belong to the citizens of all free governments." Slaughter-House Cases, 83 U.S. 36, 96-98 (1872) (Field, J., dissenting).

Contemporary legal thinking supports the idea that

the judgment in Brown can be explained as implementing the right of access. The Supreme Court has now applied this right to public institutions. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) held that implicit in the guarantees of the Constitution is a right of access for the press to attend and gather information at criminal trials. The major opinion held that this was an unenumerated right protected by the Constitution. More recent cases extended this right to voir dire proceedings, Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984), and preliminary hearings, Press-Enterprise Co. v. Superior Court of California, 54 U.S.L.W. 4869, June 30, 1986.

This theory received recognition in two prior Supreme Court cases. Justice Powell, dissenting for himself and Justices Brennan and Marshall, asserted in Saxbe v. Washington Post Co., 417 U.S. 843 (1973), that the press has a right of access to federal prisons to obtain information when neither the gathering nor publishing of it creates security risks. Four years later, Justice Stevens, dissenting for himself and Justices Powell and Brennan, presented a similar position in Houchins v. KQED, 438 U.S. 1 (1977). Neither Justice Marshall, who had agreed with this position in Saxbe, nor Justice Blackmun, participated in this case. Justice

Stewart's concurring opinion is quite similar in reasoning to the dissent.

An even older Supreme Court case holds that municipalities are limited in the power to deny use of public parks. In Saia v. New York, 334 U.S. 558 (1948) the Supreme Court invalidated an ordinance which was applied to prohibit a Jehovah's Witness from amplifying his lectures in a public park on Sunday. Those who wanted quiet or did not want to receive the religious message had to give way to a preferred interest. (The Saia case may have been reversed sub silentio, but remains instructive on the scope of the right of access to public institutions.)

In addition, Professor Larry Tribe has written on the right of access. He states that any government-imposed restriction on "entry" (e.g. "imposing quantitative controls on immigration") that discriminates against new residents is "void unless compellingly justified." This would apply to land use regulations intended to exclude new residents. American Constitutional Law 955 (1978). Consistent with such thinking, a federal district court in California held that Petaluma's limit on housing development to 500

permits annually violated the right to travel. Construction Industry Ass'n v. City of Petaluma, 375 F.Supp. 574 (N.D.Cal. 1974), rev'd (for lack of standing to raise the travel issue) 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976). This decision is based substantially on two Pennsylvania cases that struck down exclusionary zoning regulations, Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) and Appeal of Kit Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970).

In my opinion, the concept of the right of access is relevant to prohibiting racial segregation in public schools and the recent media access decisions reveal that the right of access is currently being applied to governmental institutions that are analogous to public schools.

4. You wrote in your book, at page 106, that "this right [of access] protects a person's opportunity to pursue happiness and well-being through free access to places and areas throughout the nation." Are there any limitations on this constitutional right of access to every place and area in the country?

A. The right to travel has long been considered by the U.S. Supreme Court as a fundamental right. Under current law, any limitation on fundamental rights is subject to examination under a standard of strict scrutiny. In my view, every person has a constitutional right of access to every public place and area in the country, but this right is not absolute. However, under existing law,

restraints on it must survive the highest standards of judicial review.

5. You wrote in your book that the issue in the Brown case under your analysis is whether there was a "sufficient justification" for denying black children the "right of access" to the public schools. What standard should the Court have applied in determining whether there was a "sufficient justification" for excluding blacks from the white schools? Should it have employed a subjective or an objective test?

A. The appropriate standard in 1954 was what would nov be regarded as one of intermediate scrutiny. "Sufficient justification" requires a judgment of the court under this standard and must necessarily be based mostly on subjective considerations. Race, however, is clearly not a "sufficient justification" for denying black children the right of access to the public schools.

6. You wrote in The Supreme Court's Constitution that the denial of the right to access in the school segregation cases could not be justified because it was based on "prejudicial attitudes or feelings." In your view, is this analysis equally applicable to "prejudicial attitudes and feelings" not based on race? Would prejudice against any group be an insufficient justification for denial of the right of access?

A. In my view, "prejudicial attitudes and feelings" do not provide sufficient justification for restraining a fundamental right. This would hold true in all situations.

7. Since you agree with the result in Brown I, what practical difference would it have made if the Supreme Court had adopted your "right of access" rationale, rather than the reasoning actually used to decide the case?

A. Very little difference, if any. In fact, I cannot think of any practical difference.

D. Questions on Economic Regulation

You have argued, in your book, Economic Liberties and the Constitution, and in other writings, that the Constitution demands that the courts look much more closely at regulatory legislation. On page 324 of your book, you advocate that the courts should apply the following standard in constitutional review of regulatory legislation:

> The government would have the burden of persuading a court using an intermediate standard of scrutiny, first, that the legislation serves important governmental objectives; second, that the restraint imposed by government is substantially related to achievement of these objectives...; and third, that a similar result cannot be achieved by a less drastic means.

8. This proposed standard would reverse the burden of proof that is currently applied in constitutional challenges to economic regulation statutes. In your view, what constitutional provision requires the reversal of the burden of proof in such cases?

A. The Constitution does not direct the court in this regard; allocation of the burden of proof is a matter of judicial discretion to achieve a just result. As I point out in my book, our constitutional system presumes substantial freedom to engage in material pursuits, and this presumption is entitled to no less recognition in the courtroom. When government proscribes these liberties, it has an obligation and responsibility to prove justification for the restraint. The presumption

that the state is correct in curtailing people's activities can only be accepted in societies where restraint is normal -- those which, unlike ours, invariably equate government direction and control with the public interest.

The preceding observations are taken for granted in our criminal, as well as our fundamental liberties, jurisprudence. It is also accepted that in interstate commerce cases involving the "negative" commerce clause, the state may have to bear the burden of proof. Demanding that the aggrieved party assume this obligation operates to limit freedom, as Justice Brennan explained in Speiser v. Randall, 357 U.S. 513 (1958). Such a rule, Justice McReynolds pointed out in Nebbia v. New York, 291 U.S. 502 (1934), makes it, as a practical matter, quite difficult and at times impossible for the individual to obtain judicial vindication.

According to Wigmore, the allocation of the burden of proof is merely a question of policy and fairness based on experience in different situations. An important factor is that it should be borne by the party best able to know the truth and falsity of the facts. 9 J. Wigmore On Evidence Section 2486 at 275, (3rd Ed. 1940). Such considerations warrant that governmental

authorities bear the burden of explaining and justifying why they have curbed economic liberties. Because an intermediate standard of review is proposed, the state would confront a less arduous undertaking than in the fundamental liberties area. See Justice Brennan's discussion on the allocation of the burden of proof in school desegregation cases in Keyes v. School District No. 1, 413 U.S. 189 (1973).

9. In your writings, you have been highly critical of the legislative process in the field of economic regulation. Is this one of the reasons why you think the courts should not show as much deference to legislative decisions as they now do in this field?

A. I think judicial review of economic legislation will be beneficial to society as a whole. My purpose in considering the limitations of some legislatures with regard to economic regulations is not to disparage the legislative process in general, which is obviously indispensable to our form of government, but to show that judicial review may be needed as much in the economic area as in the political area when people are unfairly harmed by regulation.

I wrote that in the good society, some measure of protection is always appropriate for those who for good and bad reasons lose in the political or administrative struggles. We should find trusting the legislatures and the agencies with final discretion over economic

liberties as absurd as we find entrusting them with final discretion over the political liberties.

The point I was trying to make is the importance of judicial review. At the present time courts give virtually no scrutiny to economic regulation. In my book, I suggested that a higher level of scrutiny would be appropriate.

10. In your writings, you have often made the point that legislators are usually not experts in the fields about which they legislate. For example, on page 274 of Economic Liberties and the Constitution, you wrote:

> Under our system, a legislature is charged with implementing the public's political will. To fulfill this obligation, a lawmaker must be able to comprehend well both the social problems and the legal means for coping with them....For a number of reasons, these responsibilities are frequently beyond most legislators' ability and capacity. To vote intelligently on proposed statutes demands reasonably expert knowledge of the subject matter, which few legislators possess about a great portion of measures they consider....Legislators lack the time, and probably also the will and inclination, to become very knowledgeable.

Should the relative expertise of legislators be a factor in a court's determination, either of the meaning of a disputed provision of legislation, or of the constitutionality of legislation, in the economic regulation field?

A. The constitutionality of a law does not depend on the relative expertise of the legislators who enacted it. It is possible that in certain circumstances, the level of the legislators' expertise might be a factor in a court's analysis of the meaning of a disputed

provision of the legislation, particularly in certain highly technical fields.

11. You have raised another criticism of the legislative process: that most laws are the result of compromises. On pages 276-77 of Economic Liberties and the Constitution, you wrote the following:

> Politics is said to be the art of the possible, and here the possible means continuous compromise. This ingredient also severely retards the effectiveness of the political process. Assuming the Perfect Plan is introduced in the legislature, it is likely to be quite imperfect by the time it clears public hearings, committee, and floor votes. Sometimes the situation can be compared to surgery conducted by a team composed of Christian Scientists, exorcists, and surgeons.

Should a court's decision on the meaning or the constitutionality of a regulatory statute be influenced by whether or not the statute was the product of a compromise?

A. A court must decide the constitutionality of a regulatory statute on the basis of its language and legislative history. The nature of the legislative process that enacted it, that is, whether the law was passed narrowly or by a wide margin, or whether it was adopted as first proposed or was the result of repeated compromise, is not relevant to its constitutionality. However, in trying to determine the meaning of a particular provision, where legislative history reveals that the final language was the result of a compromise on a disputed point, a judge should carefully review legislative history to determine the most accurate meaning of the provision.

12. Part of your criticism of the legislative process is directed at those who empower the legislators: the voters. Your chapter entitled "Limitations and Infirmities of Legislative Processes" devotes several pages to a discussion of what you call "the irrational and erratic nature of the popular franchise." You point out that many people don't vote; many voters are not knowledgeable about the issues; a candidate's success often depends on irrelevant factors like speaking ability or good looks.

What relevance should these considerations have to the degree of deference that a judge should give to legislative decisions in the field of economic regulation?

A. None. The job of the judge is to apply the law. Whatever the infirmities of the democratic process, it is unquestionably the best form of government that has ever been devised. My discussion of the legislative processes in Chapter 14 of Economic Liberties and the Constitution was designed to emphasize the importance of judicial review in the economic area. In the same way that judicial review in the area of social and political rights is often an effective safeguard of our constitutional liberties, so judicial review in the area of economic rights can help protect important rights.

13. You develop many of the same criticisms in an article entitled "Land Use Planning in America," in the Environmental Law Journal. There you conclude: "The simple, yet highly profound answer, is that public land use planning is doomed to failure in a representative society." You repeat these criticisms in your book on the general topic of regulatory legislation. Do you still believe that "public land use planning is doomed to failure in a representative society"? Do you reach the same conclusion about other types of regulatory legislation?

A. I do not believe that public land use planning is invariably a useless or counterproductive activity, since it clearly will achieve many important benefits. As a scholar, however, I believed it was important to recognize its limitations and understand the alternative approaches that are available and the benefits they may provide. The context in which the quote appears is important. If public land use planning is evaluated on the basis of what was once claimed for it; that it can achieve an orderly, efficient, rational arrangement for the use of land, I think "public land use planning is doomed to failure in a representative society." The argument for my position is presented in the article referred to, particularly on pages 398-401. As for other types of regulatory legislation, I agree with what I understand to be the prevailing opinion among academic economists -- that each regulatory situation must be judged on its own.

E. Additional Questions on the Nominating Process

During a discussion sponsored by the Federalist Society of Duke University Law School on February 17, 1988, Assistant Attorney General Steve Markman indicated that officials of the Justice Department had "extensive discussions" with you concerning the views you expressed in your writings. Please

answer the following questions regarding these discussions and the process by which you were selected:

14. Please list all interviews or communications you had with the White House staff or the Justice Department regarding your nomination and the dates of such interviews or communications, and identify all persons present or participating in such interviews or communications.

A. Attached are copies of schedules for two days of interviews relating to my nomination. The only communications I recall were my sending copies of published writings or manuscripts to persons at the Justice Department whose names I do not recall, who I believe worked for Steve Markman. I had no interviews with White House personnel relative to my nomination.

15. Please identify each communication you had from January 1, 1985 through the date of your nomination with any member of the White House staff or the Justice Department referring or relating to your views on any case, legal issue or question that could come before the United States Court of Appeals for the Ninth Circuit; state who was present and who participated in such communication; and describe fully what transpired. Please include within your response to this question any communication relating to your published writings.

A. In my interviews, I discussed many legal issues and questions with the members of the Justice Department named on the attached schedules, but none with specific reference to any particular Ninth Circuit case, either pending before the court or being considered at the district court level. It is likely, given the wide range of these discussions, that they

may have included a "legal issue or question that could come before the United States Court of Appeals for the Ninth Circuit," but I recall no such identification in any discussions.

U.S. Department of Justice
Office of Legal Policy

Office of the
Assistant Attorney General

Washington, D.C. 20530

SCHEDULE FOR PROFESSOR BERNARD SIEGAN, JUNE 19, 1985

9:45 a.m.	Charles Cooper Deputy Assistant Attorney General Civil Rights Division Room 5639
10:30 a.m.	Jay Bybee Attorney-Advisor Office of Legal Policy Room 4246
11:30 a.m.	Roger Marzulla Deputy Assistant Attorney General Lands and Natural Resources Room 2143
2:00 p.m.	Grover Rees Special Assistant to the Attorney General Room 5123

MEMORANDUM July 17, 1986

TO: T. Kenneth Cribb, Jr.
Counselor to the Attorney General

William Bradford Reynolds
Assistant Attorney General
Civil Rights Division

John Bolton
Assistant Attorney General
Office of Legislative Affairs

Charles Cooper
Assistant Attorney General
Office of Legal Counsel

Steve Calabresi
Special Assistant to the
Attorney General

Lee Liberman
Deputy Associate Attorney General

John Harrison
Deputy Associate Attorney General

Steve Matthews
Deputy Assistant Attorney General
Office of Legal Policy

Sol Wisenberg
Attorney Advisor
Office of Legal Policy

Seth Liebman
Attorney Advisor
Office of Legal Policy

FROM: Stephen J. Markman
Assistant Attorney General

SUBJECT: Monday's Discussions with Professor Bernard Siegan Concerning the Judicial Vacancy for the Ninth Circuit

Attached for your use and information is a resume for Professor Siegan. He will be at the Department on Monday, July

21 for a series of discussions, as listed in the schedule below.

9:15	Brad Reynolds, Room 5643
10:00	John Bolton, Room 1603
11:00	~~Chuck Cooper, Room 5214~~
12:00	Ken Cribb, Room 5111
12:30	Lunch
2:00	Steve Markman, Room 4234
3:00	Lee Liberman/John Harrison, Room 4114
4:00	Sol Wisenberg/Seth Liebman, Room 4248
~~5:00~~	Steve Calabresi/Steve Matthews, Room 4237

Attachment

Insert page 36

I helped prepare an amicus brief filed by the Pacific Legal Foundation in Construction Industry Association of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) reversing 375 F.Supp. 574 (N.D. Cal. 1974)

Insert page 77

The New York Times article does not directly concern the issue that my nomination presents. As a practicing lawyer for a lengthy period of time, I am fully aware that it is not always simple to determine existing precedent; it may at times be exceedingly difficult. I agree with Judge Coffin that often there is no decisive precedent. The issue my nomination has presented is what should the judge do when precedent is not clear.

The oath of office for a circuit court judge requires him or her to uphold and implement the law of the land as interpreted by the Supreme Court. As lawyers continually do, this requires the judge to dig deeply into the law reports to determine existing law. I have been involved in this task many times, and as Judge Coffin asserts, lawyers may come up with different answers. The point is to use always as a basis for research the decisions of the Supreme Court. Lawyers are frequently given to personal opinions about what the law should be, but obviously this should not enter into the undertaking. The object is to formulate an opinion that would be upheld by the Supreme Court. In the absence of available precedent, the judge should attempt to determine the general intention or orientation of the court in matters such as the one under consideration. The object is to apply the Court's disposition as distinguished from that of the judge.

Insert page 77 continued

An "inferior court" judge--to use the constitutional language--is effectively an agent for the high court in interpreting the law and should proceed on that basis. When an agent is not given prior instruction by the principal--that is, when precendent is not certain--the agent should seek as best as possible to act as the principal would under the circumstances, not as the agent deems best.

Insert page 90

My Register column of January 28, 1978, discussed a paper written by Andrea H. Beller published in the October 1976 issue of Journal of Law and Economics (pg. 359-380). Ms. Beller was at the time on the staff of the Institute for Independent Study, Radcliffe College. The title of the article is "The Economics of Enforcement of an Antidiscrimination Law: Title VII of the Civil Rights Act of 1964."

Ms. Beller's paper was based on her Ph.D. dissertation submitted to the Department of Economics, Columbia University, 1974. Her research was initially supported by dissertation fellowships from the Ford Foundation and the American Association of University Women. Much of the material in the paper was prepared for the Manpower Administration, U.S. Department of Labor, under a grant. Further support came from funds granted to the Institute for Research on Poverty at the University of Wisconsin-Madison by the Department of Health, Education, and Welfare pursuant to the Economic Opportunity Act of 1964.

The Journal of Law and Economics is published by the University of Chicago Law School and is generally regarded as a highly prestigious and selective academic journal.

Thus, as was my practice throughout my 5 years' experience as a newspaper columnist, I discussed in my column an article worthy of attention and study. I thought it an important article in an area of great concern to the nation. For the information of the U.S. Senate I have attached a copy of the article.

Insert page 90 continued

Ms. Beller's conclusion of her study appears on page 378, and is as follows:

> An inherent conflict makes it difficult, if not impossible, for equal employment opportunity laws to eliminate both employment and wage discrimination simultaneously. Complying with the laws' wage provision sets up an incentive for competitive firms to reduce relative employment, but complying with the employment provision requires them to increase it. Because of this conflict, enforcing these laws may make the minority group even worse off.
>
> Title VII's overall effects on the relative economic position of black males closely and consistently approximate the combined effects of its employment and wage provisions. Enforcing the employment provision increased both relative black employment and wages, while enforcing the wage provision decreased them; furthermore, during the period from 1960 to 1970, the effects of the wage provision were stronger. The enforcement of Title VII as a means to combat racial discrimination must be characterized as unsuccessful during the sixties, for the combined effect of its provisions was to reduce, albeit insignificantly, relative black employment and wages.

My conclusion that a principal accomplishment of the law "is the imposition of higher prices and the acceleration of inflation" is based on the foregoing paragraphs and other parts of the Beller paper. I quote from my column:

> Nevertheless, [despite the absence of benefits] this law has probably caused significant upheaval in industrial practices in this country as firms seek to avoid the extra costs imposed by the law. A company might alter its operations and even its location to minimize the law's impact. Beller explains that the employment provisions require covered firms to attain certain proportions of black to white workers depending on location and occupation. To offset the increased cost that the law causes, firms might migrate into states or counties with lower proportions of blacks in

Insert page 90 continued

> the labor force, substitute machinery for workers, or change the mix of occupations to favor those with relatively few blacks. In making such changes firms risk being penalized for violating the law.

Although obviously well intended the law was creating problems for the people it was supposed to benefit. As I said in my column, "any increase in prices is most harmful to those with the least amount of spendable income."

Columns of this character are in the best tradition of a free and open press. A free society require that the public know how the nation's laws are operating. Lawmakers should be most concerned about the effectiveness and consequences of the laws they pass. My column served well both purposes.

University of San Diego

School of Law

April 18, 1988

The Honorable Patrick Leahy
United States Senate
Washington, DC 20510

Dear Senator Leahy:

In the last hearing I indicated to you that I had over the years acquired abilities as a scholar, researcher and writer which overcome my lack of experience in trial work. I wish to bring some of my accomplishments in this respect to your attention.

On February 4, 1988, my book, The Supreme Court's Constitution: An Inquiry into judicial Review and its Impact on Society, received a 1987 honorable mention (second place award) in the category of law books from the professional scholarly publishing division of the Association of American Publishers (AAP). This is a major award from the trade association to which most of the nation's publishers belong. A copy of the award certificate is enclosed.

The publishing community has in the past recognized my books. Two were alternate selections of prestigious book clubs: Land Use Without Zoning was an alternate selection of the Library of urban Affairs for Spring 1974, and Other People's Property was an alternate selection of the Lawyer's Literary Club for October 1977. The Planner's Book Service of the American Society of Planning Officials (now known as the American Planning Association) offered land Use Without Zoning in January 1973. Economic Liberties and the Constitution was published by the highly respected and very selective University of Chicago Press. In 1984, this book was the sole subject of a three-day conference attended by 12 leading constitutional scholars.

Probably most land use case books have cited and/or quoted from Land Use Without Zoning or my article "Non-Zoning in Houston" (Journal of law & Economics, April 1970). Constitutional case books are beginning to cite and quote from Economic Liberties and the Constitution.

Kindest personal regards,

Bernard H. Siegan
Distinguished Professor
of Law

Alcalá Park, San Diego, California 92110 619/260-4600

Encl.

Association of American Publishers

Professional and Scholarly Publishing Division

Annual Awards for Excellence in Publishing

Honorable Mention *

1987

Law

presented to Transaction Publishers

for The Supreme Court's Constitution: An Inquiry into Judicial Review and its Impact on Society

by Bernard H. Siegan

* (Second Prize)

1342

Senator HATCH. Can I also put into the record, Mr. Chairman, that letter from Phil Kurland, and also a Wall Street Journal article that appears today called "Model for Siegan is Kosinsky, not Bork," and have both of those go into the record at this time?

Senator METZENBAUM. Without objection, so ordered.

[Letter and article follow:]

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

18 February 1988

Dear Senator:

Professor Bernard Siegan has been nominated for an appointment to the Court of Appeals for the Ninth Circuit and will appear before the Judiciary Committee shortly for its advice and consent. I have known Siegan for many years and wish to vouch for him. I need not share his jurisprudential outlook to be able to assure you that he is in the mainstream of legal thought, not given to crusades for wholesale revision of constitutional doctrine, thoroughly wedded to Anglo-American principles of stare decisis, and recognizes that the role of the intermediate appellate judge is to keep the trial courts in line with their and his masters' voices, those of the Supreme Court.

Like others who already serve on the federal bench, he is not unaware of economic elements in contemporary jurisprudence, but I do not think he would abdicate the role of the courts to the control of the marketplace. And I think he would, if he could, expand the area of individual rights but within the confines created for him by the Court. I am certain that he is not contaminated by any prejudice based on race, creed, color or gender. In sum, he is a conservative scholar, learned in the law and prepared to serve it in the tradition of Jackson and Harlan. I commend him to you.

Sincerely,

Philip B. Kurland

Senator Joseph Biden, Chairman
Judiciary Committee
United States Senate
Washington, DC 20510

PBK/s

[From the Wall Street Journal, Feb. 25, 1988]

Model for Siegan Is Kozinski, Not Bork

(By John Dentinger)

U.S. 9th Circuit Court of Appeals nominee Bernard Siegan is described by liberal opponents as making Robert Bork look like a moderate. Some conservatives, wishing to refight the Bork battle, are going along with this characterization. But this is a strategic and intellectual error—on both sides.

Messrs. Bork and Siegan are of two different schools of constitutional interpretation. When Mr. Stegan obeys what he believes to be the dictates of the Constitution, he would give the benefit of the doubt to the liberty of the individual. Mr. Bork, by contrast, repudiated his earlier libertarianism and adopted an explicit majoritarianism. This is why a genuine civil libertarian foe of Mr. Bork's nomination like Harvard's Alan Dershowitz could endorse fellow law professor Siegan, of the University of San Diego.

A better parallel to Mr. Siegan might be found in Ninth Circuit Judge Alex Kozinski, whose 1985 nomination to that court was hotly opposed by liberals who thought him a right-wing ideologue, ignoring evidence to the contrary from liberal sources. Yet a number of his decisions have surprised those who opposed him.

In his majority opinion in *U.S. v. Thompson*, Judge Kozinski upheld a challenge to the exclusion of the defense attorney from a hearing in which the judge questioned the prosecutor about possible racial discrimination in the prosecutor's use of peremptory challenges to jurors.

The defendant was apparently guilty, so the short-term result orientation one might expect of a conservative in this kind of case would have dictated a different result. But Judge Kozinski evidently believed the long-term result of short-term result orientation would be to erode the rights of all, precisely the civil libertarian line (though a line many civil libertarians fail to apply to economics).

In his majority opinion in *Cruz v. Abbate*, Judge Kozinski ordered the federal district court to reconsider a motion by several criminal defendants challenging the method of assigning trial judges. "The selection of a judge to preside at a criminal trial is a matter of considerable significance to the criminal defendant. . . . While a defendant has no right to any particular procedure for the selection of the judge . . . he is entitled to have that decision made in a manner free from bias or the desire to influence the outcome of the proceedings."

In *Tamapua v. Shimoda*, Judge Kozinski's majority opinion reversed a theft conviction on the grounds that the indictment did not charge that the defendant obtained the property without authorization, and hence did not allege a crime—a "technicality" one might expect a conservative to overlook.

In a testy dissent in *U.S. v. Parts*, Judge Kozinski concluded that a defendant's right to a fair trial was violated by the government's refusal to force a prosecution witness to testify under a limited grant of immunity, even as the government built its case on a hearsay account of that witness's out-of-court statements.

In *U.S. v. Notes*. Judge Kozinski dissented from an opinion upholding a secret search of airline luggage for money people might be trying to take out of the country. "We . . . don't know precisely how many suitcases are opened and searched every day without the knowledge or consent of their owners, but the number appears to be very substantial." Apparently, he wrote, there are hundreds of thousands, of such clandestine searches a year, although "clandestine searches are, by and large, foreign to our way of thinking because of their inherent intrusiveness, the heightened risk of abuse they pose, and because they are inconsistent with principles of openness and fair play we normally expect of our public officials."

In the 1986 "Gay Olympics" case, Judge Kozinski wrote a 14-page dissent from a refusal to have the case reheard by the full court. "To say that the word Olympics is property begs the question. What appellants challenge is the power of Congress to privatize the word Olympic, rendering it unutterable by anyone else in connection with any product or public event. . . . If Congress has the power to grant a crown monopoly in the word Olympic, one wonders how many other words or concepts can be similarly enclosed, and the extent to which our public discourse can thereby be impoverished."

All this is not to suggest Judge Kozinski bends precedent or the Constitution to achieve libertarian results; he has on occasion written a reluctant concurrence explaining what he thinks is wrong with the precedent that he as an appellate judge must follow. Yet civil libertarians could scarcely find a more lucid proponent of their ideals in these and similiar cases.

And Judge Kozinski did not disappoint his conservative supporters in, for example, the significant 1986 *Hall v. Santa Barbara* ruling striking down a 1984 rent control law. But liberals should applaud this, too, because rent-control causes underutilization and depletion of housing stock, contributing to homelessness. Failing to distinguish between libertarian conservatives and statist conservatives can work against the interests of liberals. Prof. Dershowitz shouldn't be the only one keeping that in mind as Bernard Siegan receives long-delayed Judiciary Committee consideration today.

Senator HATCH. Could I ask one other question? I do not mean to prolong this. Do you see any unconscionable laws as interpreted by the Supreme Court in existing law today?

Mr. SIEGAN. No.

Senator HATCH. Laws that you would find unconscionable?

Mr. SIEGAN. No.

Senator HATCH. So what you are really referring to is the extreme example. When you say that you might have to resign, it would be the extreme example of our country ignoring people's basic, fundamental rights and privileges in favor of state domination on the order of what the Nazis did to the Jews in Germany prior to and during the Second World War?

Mr. SIEGAN. That is correct.

Senator HATCH. It would have to rise to that type of heinous activity?

Mr. SIEGAN. Yes, that is correct.

Senator HATCH. Okay. I think you have clarified yourself very well and, frankly, I hope that our colleagues on this committee will give you a fair vote because I think if they will they will vote for you because, clearly, I think Professor Kurland, since he did testify against Bork and thought he was outside the mainstream—when he says you are in the mainstream, I think these very same people who relied on him then ought to rely on him now.

Mr. SIEGAN. Thank you, Senator.

Senator METZENBAUM. Thank you very much. Thank you, Professor Siegan.

Mr. SIEGAN. Thank you.

[Whereupon, at 12:35 p.m., the committee was adjourned.]

[Additional material supplied for the record.]

The Journal of

LAW & ECONOMICS

VOLUME XXI (2) OCTOBER 1978 PRICE $6.00

How British Is the British Sickness?
By SAMUEL BRITTAN 245

The Demand for State Regulation of the Electric Utility Industry
By GREGG A. JARRELL 269

Vertical Integration, Appropriable Rents, and the Competitive Contracting Process
By BENJAMIN KLEIN, ROBERT G. CRAWFORD, AND ARMEN A. ALCHIAN 297

The Beneficiaries of Trucking Regulation
By THOMAS GALE MOORE 327

Minimum Wages, Welfare, and Wealth Transfers to the Poor
By KEITH B. LEFFLER 345

The Economics of Enforcement of an Antidiscrimination Law: Title VII of the Civil Rights Act of 1964
By ANDREA H. BELLER 359

Community Environment and the Market Value of Single-Family Homes: The Effect of the Dispersion of Land Uses
By RONALD N. LAFFERTY AND H. E. FRECH III 381

A Test of the Property-Rights Theory of the Firm: Water Utilities in the United States
By W. MARK CRAIN AND ASGHAR ZARDKOOHI 395

The Institutional Framework for Municipal Incorporation: An Economic Analysis of Local Agency Formation Commissions in California
By DOLORES TREMEWAN MARTIN AND RICHARD E. WAGNER 409

***Utah Pie* and the Consequences of Robinson-Patman**
By KENNETH G. ELZINGA AND THOMAS F. HOGARTY 427

Collusion, Efficiency, and Antitrust
By JOHN R. CARTER 435

THE UNIVERSITY OF CHICAGO LAW SCHOOL

THE ECONOMICS OF ENFORCEMENT OF AN ANTIDISCRIMINATION LAW: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964*

ANDREA H. BELLER
Institute for Independent Study, Radcliffe College

INTRODUCTION

DO EQUAL employment opportunity (EEO) laws actually improve the economic position of minorities? More fundamentally, *can* they improve the economic position of minorities? If such laws are effective, society may want to allocate more resources to their enforcement; if not, perhaps it can make them more effective. This paper examines these issues with respect to Title VII of the Civil Rights Act of 1964.[1] Its national scope and comprehensive

* This paper is based on my Ph.D. dissertation submitted to the Department of Economics, Columbia University, 1974. I am indebted to Professor James Heckman for substantial assistance in developing this project and for his continued guidance throughout. Important suggestions were also made by Professors Jacob Mincer, Sherwin Rosen, and Mark Rosenzweig. Professors Michael Barth, Ronald Britto, Stanley Masters, John Quigley, Burton Weisbrod, and an anonymous referee made helpful suggestions on earlier drafts of this paper. This research was initially supported by dissertation fellowships from the Ford Foundation and the American Association of University Women. Most of the material in this paper was prepared for the Manpower Administration, U.S. Department of Labor, under grant No. 91-36-07. Further support came from funds granted to the Institute for Research on Poverty at the University of Wisconsin-Madison by the Department of Health, Education, and Welfare pursuant to the Economic Opportunity Act of 1964. Since grantees conducting research projects under government sponsorship are encouraged to express their own judgment freely, this paper does not necessarily represent the official opinion or policy of the Department of Labor or the Department of Health, Education, and Welfare. The grantee is solely responsible for the contents of this paper.

[1] Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. See 42 U.S.C. §2000e-2000e-15 (1973). It covers all employment practices that would tend to deprive any individual of employment opportunities or affect his or her status as an employee. Prior to 1972, the law covered firms with 25 or more employees; after the 1972 amendments, it covered those with 15 or more employees. The Equal Employment Opportunity Commission (EEOC), created by the original law, has the power to receive and to investigate charges of discrimination filed by aggrieved individuals or by a member of the Commission who has reasonable cause to believe that discrimination has occurred. Charges must be deferred to state and local Fair Employment Practices Commissions (FEPC) for a specified time period. If the FEPC cannot reach an acceptable agreement, the EEOC takes over. While voluntary conciliation procedures must be exhausted first, the ultimate power of the law lies in the threat of court suit. For a more detailed discussion of Title VII, see Andrea H. Beller, The Effects of Title VII of the Civil Rights Act of 1964 on the Economic Position of Minorities 5-12 (1974) (unpublished Ph.D. dissertation, Columbia Univ.).

coverage of firms and of practices make Title VII the most far-reaching federal EEO statute.

Title VII's goal is to eliminate discrimination in the labor market. Toward this end, the law consists of two basic provisions. The employment provision prohibits discriminatory restrictions limiting the access of minorities to firms and occupations. The wage provision declares illegal pay differences based upon race. By analyzing the employment and wage provisions separately, this study reveals an inherent conflict between them, a conflict that the empirical results bear out. On the one hand, by raising black wages relative to white wages, the wage provision induces firms to decrease black employment relative to white employment. On the other hand, the employment provision requires firms to increase their black-to-white employment ratio. The empirical results show that the wage provision counteracts the benefits of the employment provision, so that enforcing Title VII left the employment and earnings of black males relative to white males unchanged through 1970.

Previous studies of Title VII's effect show mixed results. These studies may be characterized as microeconomic cross-sectional studies that use limited samples and as macroeconomic time-series studies. The cross-sectional studies found that the law had little impact on relative minority employment in establishments or unions that had been subject to enforcement activities.[2] Not only do they use limited samples, but these studies also ignore the deterrent effect of Title VII's enforcement. In one of them, for example, Adams paired twenty-six firms, with which the Equal Employment Opportunity Commission (EEOC) had successfully conciliated charges of race discrimination during 1967 and 1968, with twenty-six other firms in the same labor and product market, with which the EEOC had had no contact, even though they were covered by the law. There was little difference in the changes in occupational distribution and participation rates of minority employees among the pairs. But, Adams's conclusion that EEOC conciliations did not improve minority employment is unconvincing; for if the EEOC's enforcement activities deter discrimination in other covered firms, his methodology is biased toward finding no effect. The present study improves upon previous work, first, by using more comprehensive data and, second, by developing a methodology that incorporates Title VII's deterrent effect, thus avoiding the bias toward finding no effect.

In contrast, in a comprehensive time-series study that does not suffer from

[2] Arvil V. Adams, Towards Fair Employment and the EEOC: A Study of Compliance Procedures Under Title VII of the Civil Rights Act of 1964 (1973); Benjamin Wolkinson, Blacks, Unions, and the EEOC (1973); Alice E. Kidder, Federal Compliance Efforts in the Carolina Textile Industry: A Summary Report (Dec. 1972) (paper presented at the Industrial Relations Research Assoc. meetings, Toronto).

these defects, Freeman[3] found that the EEOC significantly increased the earnings of blacks relative to those of whites, findings that another study seems to confirm.[4] Using a log-linear specification, Freeman estimates the relative and absolute earnings of black men and women between 1947 and 1971 as a function of time or the trend level of gross national product, the deviation of real gross national product from the trend, the difference between black and white schooling, and the cumulative real expenditures of the EEOC per nonwhite worker. Freeman's estimates suggest that between 1965 and 1971 the EEOC increased the black-white earnings ratio 15 per cent for males and 27 per cent for females.

But Freeman's estimates are contradicted in a study by Butler and Heckman.[5] At the same time as expenditures of the EEOC grew, average real benefit levels in the Aid to Families with Dependent Children (AFDC) and in the Unemployment Compensation Insurance (UI) programs grew as well. Arguing that the growth in benefits caused low-wage blacks to withdraw from the labor force at a greater rate than low-wage whites, Butler and Heckman show that an increase in measured wages of working blacks relative to working whites results. Once they control statistically for the relative labor-force participation of blacks, or in the reduced-form equations for the growth in benefit levels in these income transfer programs, the EEOC has no effect on relative black earnings. The present study provides new nationwide cross-sectional evidence consistent with the Butler-Heckman time-series findings. It shows that Title VII's enforcement had no significant overall effect on the earnings of black males relative to those of white males through 1969.

A model analyzing Title VII's employment and wage provisions and the deterrent effect of Title VII's enforcement is laid out in Section I. Sections II and III empirically test the impact of Title VII's enforcement through 1970 on the relative employment of black males in the covered sector and in the economy, and through 1969 on the relative wages of nonwhite males in the economy. Section IV contains the conclusion.

I. Theoretical Analysis

The extent to which a firm complies with Title VII depends upon its actual costs of compliance with and expected costs of violating the law. In order to

[3] Richard B. Freeman, Changes in the Labor Market for Black Americans, 1948-72, 67 (1973) (Brookings Papers on Econ. Activity 1).

[4] Wayne Vroman, Changes in Black Workers' Relative Earnings: Evidence from the 1960s, in Patterns of Racial Discrimination (George M. Von Furstenberg, Bennett Harrison, & Ann R. Horowitz eds. 1973).

[5] Richard Butler & James J. Heckman, The Impact of the Government on the Labor Market Status of Black Americans: A Critical Review, in Equal Rights and Industrial Relations ch. 9, at 235-81 (1977).

understand the costs of compliance, we are going to examine the competitive firm's and industry's responses to both the employment and wage provisions. This examination shows us how relative black employment and wages can change in the covered sector and in the economy. As for the covered firms' expected costs of violation, they depend upon the enforcement activities of the EEOC. The EEOC enforces Title VII after an individual charges a firm with specific discriminatory acts. In approximately 70 per cent of the charges, the EEOC restricts its investigation to these specific acts, so that the employment and wage provisions are often enforced separately. Since the expected costs of violating each provision depends upon its enforcement, firms may be induced to comply with one provision but not with the other.

A. *Employment and Wage Effects of Compliance with Title VII*

The employment provision requires covered firms to attain some target proportion of black to white workers. This target will differ by location and by occupation.[6] Covered firms try to attain that target by increasing their employment of black workers relative to white workers. If many firms comply simultaneously, the demand for black workers relative to white workers increases in the covered sector. In general, an increase in relative demand tends to increase relative wages in the economy.

Assuming the firm was in equilibrium initially, complying with the employment provision reduces its utility or increases its costs. To avoid this loss, the firm will seek out alternatives which reduce its utility or increase its costs by less than compliance. It might migrate into states or counties with lower proportions of blacks in the labor force (the firm avoids compliance only if blacks are less mobile than firms), choose a less labor-intensive production technique, or change its skill-mix toward occupations with relatively few blacks (the firm avoids compliance only until blacks alter their skills).[7] If many firms choose these alternatives, the demand for blacks and the demand for blacks relative to whites will be reduced. If avoidance prevails over compliance, the covered sector's black-to-white employment and wage ratios could fall below their initial levels.[8]

[6] The target may be determined on the basis of the ratio of qualified blacks to qualified whites in the labor force of an area. Court decisions under Title VII have stressed the need for such statistical proofs in cases where unlawful exclusion has been charged. United States Equal Employment Opportunity Commission, 5th Annual Report 20 (1969/1970).

[7] I am grateful to Glen Cain and to members of the Labor Workshop at the University of Wisconsin for suggesting the latter alternatives. On the first alternative, Ray Marshall provides evidence that when moving into the South, firms choose to locate in counties with relatively small black populations partly because they fear government-enforced quotas on black employment.

[8] Assuming that they were in equilibrium initially, firms should make alternative adjustments only until they regain their preenforcement employment ratios. So it is unlikely that in the long run relative employment and earnings will be reduced. However, enforcing the employ-

The wage provision requires covered firms to pay blacks and whites equally for the same work and to provide them equal opportunities for promotion. If an integrated firm pays blacks less, it must increase the wage of black workers. The increase in black wages causes two changes. First, covered firms tend to substitute white workers for black workers, hiring fewer blacks than otherwise. (Note that this conflicts with changes required by the employment provision; thus, complying with the wage provision may lead some firms to violate the employment provision.) And second, the increase in labor costs causes covered firms to contract in size. This scale effect reduces black employment still further and, if it dominates the substitution effect, it reduces white employment as well.

While enforcing the wage provision unambiguously reduces relative black employment in the economy and tends to create black unemployment, its effect on the average relative wage is ambiguous. Although relative wages are higher in covered firms that comply with the provision, there are two forces that tend to reduce relative wages in the economy. First, as covered firms substitute away from black labor, blacks enter the uncovered sector, tending to reduce relative wages there. And second, covered firms may once again avoid compliance by migrating or by changing their technology. The more prevalent this response, the more relative demand will fall and the greater the tendency for relative wages to decline in the covered sector.

B. *The Deterrent Effect of Title VII's Enforcement*

Now that we have examined the factors that determine a firm's costs of complying with the law, we will examine those that determine the expected costs of violating Title VII. Although many firms will never actually incur penalties, all covered firms risk them.[9] If these risks seem high, firms can be deterred from violating the law.

The model of expected costs incorporates these concepts. Expected costs are a function of the penalty for violating the law times the probability of getting caught. For each firm, the probability of apprehension depends upon the nature and extent of its violations; and it can affect that probability by

---

ment provision can cause the absolute position of black workers to deteriorate. See James J. Heckman & Kenneth I. Wolpin, Does the Contract Compliance Program Work? An Analysis of the Chicago Data, 29 Indus. & Lab. Rel. Rev. 544 (1976).

[9] The penalty incurred depends upon the effectiveness of the enforcement agency and the nature—whether employment, wage, or other—and severity of the firm's violations. In this study, it is assumed that the EEOC enforces each provision with uniform intensity across firms during any given time period, and that the firm knows the penalties associated with each of its violations. These penalties, which are assumed to be some linear function of the (known) costs of voluntary compliance, include lengthy and detailed investigations, leading to costly court battles which can entail court-ordered adjustments in hiring and personnel practices, back-pay settlements, attorney fees, court costs, and adverse publicity. Obviously, firms can avoid some of these costs by voluntarily complying with the law.

changing its practices. Although the firm cannot know that probability, it can reasonably estimate it by observing how many similarly situated firms get caught for violating each provision. Increasing enforcement increases the firm's estimated probability of apprehension which, *ceteris paribus*, causes the firm's expected costs to rise; thus, the likelihood that the firm will respond increases as the law's enforcement increases.

The aggregate response to the law's enforcement depends upon (1) the expected cost functions of all covered firms, (2) the incidence of firms that are caught with particular violations, and (3) the number of firms that learn about each enforcement action. For each firm, the probability of apprehension is a positive function of the incidence of proximate firms that get caught;[10] hence, (1) is a positive function of (2). In addition, (3) depends positively upon (2) as well; that is, the more firms that get caught, the more of them that learn about it.

In this model, the distribution of apprehension probabilities among firms depends upon the incidence of enforcement. Altering that distribution then depends upon the rate at which firms learn about enforcement. It is reasonable to suppose that, at least initially, the rate of learning increases as enforcement activities become more widespread. If this is so, then how many firms learn about enforcement and, consequently, the magnitude of the aggregate reaction will depend nonlinearly upon the incidence of enforcement.

In the next two sections, we empirically test this hypothesis. Using a cross-sectional model, we assume that information about enforcement is acquired geographically on a state-by-state basis. We test the hypotheses that relative black employment and wages change as the statewide incidence of enforcing the provisions of Title VII changes.

II. Empirical Analysis: Relative Employment

We can estimate the effect of enforcing Title VII's provisions on the employment of black males relative to the employment of white males for covered firms and for the economy. Employment records from 1966 and 1970 have been matched for a sample of covered firms; aggregating them provides statewide samples that hold firm-specific characteristics constant over time.[11] But only firms that were in business at the same location in both

[10] As used here, proximity defines an information network, which may be determined by nearness of location, common output or labor market, or any other factor, through which information about the EEOC's enforcement activities is disseminated.

[11] The original sources of these data are the Equal Employment Opportunity-1 Employer Reports (computer data base by EEOC) which the EEOC collects annually from all firms with 100 or more employees or a government contract. For a complete description of the matched sample and its potential biases, see Orley Ashenfelter & James Heckman, Measuring the Effect of an Antidiscrimination Program (Aug. 1974) (Working Paper No. 50, Center for Economic Analysis of Human Behavior and Social Institutions, Nat'l Bureau Econ. Research).

years could be matched, so this sample may suffer from selection bias. Bias would arise if the most discriminatory firms moved into areas with relatively few blacks or went out of business; in this case, our estimates could overstate black employment gains. This problem is addressed in part by using census data to estimate the effect of enforcing Title VII on relative employment in the economy. No firms are left out of these data since the sample is drawn from the entire population. Moreover, because comparable census data is available prior to 1960, we can test whether measured enforcement and changes in relative employment in the economy had been related prior to the enactment of Title VII; if they had been, results from a single cross-section could be misleading.

In any one period, firms may be only partially successful in bringing relative black employment to the level they desire; incorporating this concept, the following estimating equation is derived from a cost-of-adjustment model:

$$\ln \mathrm{RBE}_{t,i} = \lambda\alpha + \lambda\beta \ln X + \lambda\gamma \ln \mathrm{CHG} + \lambda\delta(\ln \mathrm{CHG})^2 + (1 - \lambda) \ln \mathrm{RBE}_{t-1,i} + u_{t,i}, \quad (1)$$

where RBE is the level of relative black employment, total or by occupation, in time periods t and $t - 1$; i refers to the ith occupation; X is a set of economic and demographic variables assumed to determine all employment ratios; CHG measures the incidence of enforcement; λ is the adjustment coefficient; and u_t is a disturbance term with the classical properties. The variables included in these equations are defined and their sources stated in Table 1. A value for each of the variables is assigned to each state.

The incidence of enforcement (CHG) is measured empirically by the number of charges of discrimination (C) filed by minorities and accepted by the EEOC during fiscal years 1968-1970,[12] divided by a proxy for the number of employees in covered firms (N). Across states, CHG = C/N ranges from 0.06 to 29.0 complaints per thousand employees, with a mean and standard deviation of 6.6 and 8.0, respectively.[13] The variable range in natural logarithms is

[12] Assuming that it is actually the subsequent investigation that firms seek to avoid, the number of charges recommended for investigation is an alternative measure of C. Empirical results using this alternative do not differ significantly from those presented, for investigations are highly correlated with the number of charges filed. Although data on the subsequent settlements reached by the EEOC were unavailable for this study, this is not considered a serious drawback. During the early years, the spread of knowledge about Title VII settlements, which were few, would have been limited compared to knowledge about charges or about investigations.

[13] One of the editors of this journal pointed out that many complaints might be completely erroneous, having nothing to do with discrimination and, therefore, that an increase in C/N might represent nothing more than an increase in erroneous complaints. Across states, the simple correlation coefficient between C/N and the ratio of cause findings to all findings on charges of discrimination filed by blacks through March 1972 equals .36. Thus, on the contrary, an increase in C/N actually represents a decrease in erroneous complaints.

TABLE 1
LIST OF VARIABLES USED IN EMPLOYMENT ANALYSIS

Variable Name	Definition
Relative Black Employment	The ratio of black- to white-male employment in 1970 and 1966 in the covered sector and in 1970 and 1960 in the entire state
EMPL	Total employment in 1970 in (1) the covered sector or (2) the entire state
CEMPL	Change in EMPL in (1) the covered sector between 1966 and 1970 or (2) the entire state between 1960 and 1970
PPB	Proportion of the population that is black in 1970
CPPB	Change in PPB between 1960 and 1970
GMR	Gross migration rate of blacks between 1965 and 1970
RED	The ratio of the mean years of school completed of black to white males, 25 and over, in 1970. Included in the equations for white-collar occupations only
UNEMPL	Unemployment rate of all males, 16 and over, in 1970
CUNEMPL	Change in the annual average unemployment rate between (1) 1965 and 1969 or (2) 1960 and 1969[a]
PFC	Proportion of employment in the matched sample in firms with federal contracts
CHG1, EMCHG1, and WACHG1	The total number of charges of discrimination filed by minority males and females during fiscal years 1968-1970 divided by the number of employees in Social Security reporting units with 20 or more employees in 1969. The prefix EM is used to represent charges which include violation of the employment provision as an issue and WA is violation of the wage provision[b]
FEPC64	Dummy variable assigned a value of one for states with Fair Employment Practices commissions established prior to 1964 and zero elsewhere
UNION	Union membership as a proportion of total employment in nonagricultural establishments in 1970[c]
SMSA	Proportion of employment in an SMSA in (1) the covered sector or (2) the entire state
SOUTH	Dummy variable assigned a value of one for all southern states and zero for nonsouthern states
MFG	Proportion of employment in manufacturing firms in (1) the covered sector or (2) the entire state
PEMCOV	The number of employees in Social Security reporting units with 20 or more employees divided by the total number of employees in all reporting units. This variable is included in the regressions for the entire economy only and is used as a proxy for the proportion of employment in the covered sector[d]

Sources: Unless otherwise stated, data for the covered sector are taken from the matched sample tapes, Equal Employment Opportunity-1 Employer Reports (computer data base by EEOC), and data for the entire economy are taken from 1 U.S. Bureau of the Census, United States Census of Population: 1960, pts. 1-52(1963); and *id.*, 1970 (1973). For a more detailed description of the data sources, see Andrea H. Beller, *supra* note 1.

[a] Data are from U.S. Dep't of Labor, Manpower Report of the President: April 1971 (1971).

[b] Charges data are from the Division of Systems and Control of the EEOC; data on the number of employees are from U.S. Bureau of the Census, County Business Patterns 1969, pt. 1 (1970).

[c] Data are from U.S. Dep't of Labor, Bureau of Labor Statistics, Bull. 1750, Directory of National Unions and Employee Associations: 1971 (1972).

[d] Data are from U.S. Bureau of the Census, County Business Patterns 1969, pt. 1 (1970).

$$-11.96 \leqq \ln \mathrm{CHG} \leqq -5.83.$$

The incidences of enforcement of the employment and wage provisions are measured similarly, using charges of employment or wage discrimination, respectively.[14] Because the learning process that translates enforcement into expected costs may be nonlinear, a quadratic term is introduced on the enforcement variable. Together the linear and quadratic terms estimate the short-run adjustment elasticity of relative employment with respect to the incidence of enforcement.

C/N is the closest possible approximation to the theoretical construct of a probability of apprehension; it assumes that firms utilize observed complaints in determining their response to enforcement. But this measure introduces the possibility of simultaneous-equation bias if the difference between the levels of current and past discrimination affect the rate at which charges are filed.[15] To take this into account, we estimate a simultaneous-equation model in which (the demand for) enforcement is a function of the change in relative employment.[16] Unfortunately, the two-stage least-squares (TSLS) estimates reduced many (occasionally all) coefficients to insignificance; nonetheless, they will be presented, but only for the overall incidence of enforcement and not for each provision separately. No significant differences or consistent changes are noted from the comparable least-squares estimates.[17]

[14] For the purposes of this study, the employment provision has been defined to include Title VII complaints on hiring, firing, discharge, and recall. The wage provision has been defined to include complaints on compensation, promotion, demotion, and seniority. As defined, these two provisions cover a majority of the complaints that were filed under Title VII during the period studied. The practices that have not been included in either provision but which have been included in the total are discrimination in terms and conditions, job classification, qualifications and testing, advertising, benefits, and intimidation and reprisals.

[15] A priori, it is unclear what the direction of the simultaneity would be. The demand for enforcement might be greater either where changes in relative employment are larger, causing expectations to rise, or where they are lagging behind.

[16] In the reduced form, the incidence of enforcement between 1968 and 1970 was estimated as a function of the presence by 1968 of a regional office of the EEOC in a state, the proportion of nonwhite males with at least a high school education, the proportion of nonwhite males in urban areas, the unemployment rate of black males, and the other exogenous variables in the model. The presence of a regional office of the EEOC facilitates filing charges of discrimination. We can take the locations of these offices as exogenous in modeling the original compliance system; since they were chosen to enable the EEOC to carry out its field operations, they would be independent of Title VII's enforcement. But the locations of district offices would be endogenous in modeling the current system; because they are chosen on the basis of experience, they would depend upon Title VII's enforcement.

[17] The standard errors for the provisions separately were so large as to produce meaningless results on covered-sector estimates, but meaningful TSLS estimates were obtained when examining relative black employment in the economy. These estimates, which will be presented in the next section, do not differ significantly from the single-equation estimates, so the same probably holds for the covered sector.

A. *The Effect of Enforcement on Covered Employment*

Changes between 1966 and 1970 in the relative employment of black males in the nine broad census occupations in covered firms are estimated by generalized least squares (GLS), restricted least squares (RLS), and TSLS.[18] Taken from separate log-linear equations,[19] coefficients on the overall incidence of enforcement (panel I) and on the incidence of enforcement of the employment and wage provisions (panel II) are presented in Table 2.[20]

Enforcing Title VII significantly changed relative black employment in covered firms through 1970. Across the nine occupations, the estimated coefficients on the variables measuring the overall incidence of Title VII's enforcement are jointly significant at the 5 per cent level (panel I, columns 28 and 29). Relative black employment significantly increased in the sales occupation, but declined in the professional and office and clerical occupations. These effects of Title VII overall (panel I) are related to those of its employment and wage provisions (panel II). Jointly, the provisions significantly affected relative employment in four out of the five white-collar occupations. When individually significant, enforcing the employment provision increases relative employment and enforcing the wage provision reduces it. In general, the employment provision's effect is linear.

Let us take professional occupations as an example. According to the RLS estimates (panel I, column 5), the way in which relative employment adjusts to enforcement is given by the quadratic negative relationship, .009 ln CHG 1^2; the adjustment elasticity equals .018 ln CHG 1. How much relative

[18] To correct for heteroscedastic residuals, the regressions are weighted by the square root of total employment in 1970 in the covered sector of each state. In a model such as ours, in which the lagged value of the dependent variable is used as a regressor, the coefficient estimates will be biased if the disturbances are correlated. Since we cannot correct for this here, the relative employment estimates should be viewed with caution. But the main finding of this paper—that Title VII's employment and wage provisions have jointly significant and opposing effects on the relative economic position of black males—is strong in the relative-wage model presented below, a model that does not have a lagged dependent variable. Moreover, the directions of the (possibly biased) estimated effects of the two provisions on relative employment are the only ones that are theoretically consistent with the directions of the (unbiased) estimated effects on relative wages. In sum, we are confident that this statistical problem does not affect the major conclusions of this paper.

[19] Because other approximations of the underlying relationship would be reasonable, all regressions were also run using a linear functional form. But tests on the transformed residual sums of squares were consistent with the original assumption of a log-linear relationship. See G.E.P. Box & D.R. Cox, An Analysis of Transformations, 26 J. Royal Stat. Soc. 211 (1964).

[20] While Table 2 presents the least-squares (LS) and the restricted least-squares (RLS) preliminary-test estimators for the enforcement variables, all subsequent tables present only the preliminary-test estimators. These estimators have been chosen on the basis of their joint significance according to the conventional F-statistic. All estimators are available from the author upon request. (The coefficients of some of the other independent variables of these equations are discussed briefly in the Appendix; the complete equations for all occupations are available from the author on request.)

TABLE 2

COEFFICIENTS AND SIGNIFICANCE OF INCIDENCE OF ENFORCEMENT VARIABLES FROM LOG-LINEAR REGRESSION EQUATIONS ON THE CHANGE IN RELATIVE BLACK EMPLOYMENT FROM 1966-1970 BY OCCUPATION FOR COVERED FIRMS IN THE UNITED STATES

	White-Collar Occupations														
	Officials and Managers			Professional			Technical			Sales			Office and Clerical		
	LS (1)	RLS (2)	TSLS (3)	LS (4)	RLS (5)	TSLS (6)	LS (7)	RLS (8)	TSLS (9)	LS (10)	RLS (11)	TSLS (12)	LS (13)	RLS (14)	TSLS (15)
I. *Overall Enforcement*															
1...ln CHG1	.369	.047	.013	.003	...	...	.025	...	...	−.056	...	...	.280	...	...
	(1.18)	(1.34)	(0.25)	(0.01)			(0.09)			(0.10)			(0.91)		
2...ln CHG1[a]	.020	...	...	.009	.009	.006	.004	.002	−.001	−.012	−.009	−.012	.021	.004	.007
	(1.04)			(0.41)	(3.30)[c]	(1.26)	(0.23)	(1.15)	(0.29)	(0.38)	(2.50)[c]	(2.33)[b]	(1.15)	(1.93)[a]	(1.52)
3...Degrees of freedom	22	...	...	26	...	...	25	...	...	23	...	...	26	...	...
4...*F*-test	*F*(2,22)= 1.38	...	...	*F*(2,26)= 5.09[b]	...	...	*F*(2,25)= 0.54	...	...	*F*(2,23)= 2.95[a]	...	...	*F*(2,26)= 2.29	...	...
II. *Enforcement by Provision*															
1...ln EMCHG1	.431	.137	...	−.150	...	...	−.305	−.017	...	−.702	−.005	...	.043	.157	...
	(0.93)	(2.20)[b]		(0.24)			(0.63)	(0.27)		(0.90)	(0.04)		(0.11)	(2.81)[c]	
2...ln EMCHG1[a]	.017	...	...	−.006	.001	...	−.016	...	...	−.038	...	...	−.006	...	...
	(0.63)			(0.18)	(0.23)		(0.57)			(0.87)			(0.28)		
3...ln WACHG1	−.193	...	...	.277	...	...	.299	...	...	.950	.130	...	−.116	−.204	...
	(0.51)			(0.52)			(0.75)			(1.44)	(1.14)		(0.34)	(3.92)[c]	
4...ln WACHG1[a]	−.006	.005	...	.019	.005	...	.015	.0004	...	.042	...	...	.005	...	...
	(0.29)	(1.52)		(0.70)	(1.27)		(0.77)	(0.14)		(1.26)			(0.27)		
5...Degrees of freedom	20	22	...	22	24	...	21	23	...	21	23	...	23	25	...
6...*F*-test	*F*(4,20)= 1.43	*F*(2,22)= 2.50[a]	...	*F*(4,22)= 2.34[a]	*F*(4,24)= 4.75[c]	...	*F*(4,21)= 0.34	*F*(2,23)= 0.25	...	*F*(4,21)= 1.96	*F*(2,23)= 3.30[a]	...	*F*(4,23)= 4.09[b]	*F*(2,25)= 8.89[c]	...

TABLE 2—*Continued*

	Blue-Collar Occupations													
	Craftsmen			Operatives			Laborers			Service Workers			All Occupations	
	LS (16)	RLS (17)	TSLS (18)	LS (19)	RLS (20)	TSLS (21)	LS (22)	RLS (23)	TSLS (24)	LS (25)	RLS (26)	TSLS (27)	LS (28)	RLS (29)
I. Overall Enforcement														
1...ln CHG1	.507	.017	−.005	.353	...	...	.141	.007	.048	−.080	...	...	...	...
	(1.41)	(0.42)	(0.07)	(1.39)			(0.65)	(0.26)	(1.00)	(0.29)				
2...ln CHG1[a]	.030	...	...	.021	.0005	−.002	.008	...	...	−.006	−.001	−.002	...	...
	(1.37)			(1.41)	(0.25)	(0.61)	(0.63)			(0.35)	(0.49)	(0.41)		
3...Degrees of freedom	27	...	...	29	...	...	29	...	...	28	...	...	235	244
4...*F*-test	*F*(2,27)= 0.93	...	...	*F*(2,29)= 1.01	...	...	*F*(2,29)= 0.24	...	...	*F*(2,28)= 0.16	...	...	*F*(18,235)= 2.20[b]	*F*(9,244)= 3.90[b]
II. Enforcement by Provision														
1...ln EMCHG1	1.273	...	...	.243	.052	...	−.471	.029	...	−.212	...	...	...	...
	(2.43)[b]			(0.56)	(0.90)		(1.43)	(0.61)		(0.44)				
2...ln EMCHG1[a]	.073	.002	...	.012	...	...	−.026	...	...	−.013	−.001	...	...	...
	(2.48)[b]	(0.47)		(0.49)			(1.40)			(0.48)	(0.28)			
3...ln WACHG1	−.688	.059	...	.034	...	...	.685	...	...	−.033	−.009	...	...	...
	(1.58)	(0.77)		(0.09)			(2.46)[b]			(0.08)	(0.14)			
4...ln WACHG1[a]	−.038	...	...	.003	.0018	...	.034	.001	...	−.001	...	...	...	...
	(1.73)[a]			(0.15)	(0.63)		(2.46)[b]	(0.33)		(0.06)				
5...Degrees of freedom	24	26	...	24	26	...	24	26	...	24	26	...	203	221
6...*F*-test	*F*(4,24)= 1.70	*F*(2,26)= 0.53	...	*F*(4,24)= 0.31	*F*(2,26)= 0.33	...	*F*(4,24)= 1.77	*F*(2,26)= 0.23	...	*F*(4,24)= 0.17	*F*(2,26)= 0.08	...	*F*(36,203)= 1.63[b]	*F*(18,221)= 2.50[b]

Sources: See Table 1 *supra*; and Andrea H. Beller, *supra* note 1, at app. A.

Note: All relative employment regressions include the District of Columbia and exclude Alaska, Hawaii, North Dakota, and Montana. In addition, since the variables are measured in logs, states that had no black males employed in an occupation in either 1966 or 1970 were excluded from the regression for that occupation.

In panel I, lines 1 and 2 contain GLS, RLS (with the coefficient on the linear or quadratic term constrained to zero), or TSLS coefficients on overall enforcement. The RLS specification presented is the most significant according to the *t*-statistic. Lines 3 and 4 present the number of degrees of freedom for these equations and the *F*-test for joint significance of the coefficients on enforcement.

In panel II, lines 1 and 2 contain GLS or RLS coefficients on enforcement of the employment provision and lines 3 and 4 on enforcement of the wage provision. The RLS specification presented includes one term for each provision and has the highest joint significance according to the conventional *F*-statistic. Lines 5 and 6 contain the number of degrees of freedom for these equations and the *F*-test for joint significance of the coefficients on the employment and wage provisions. *t*-statistics are in parentheses.

Since the square of the logarithm of a fraction is inversely related to its logarithm, in the quadratic specification the direction of enforcement's effect on the dependent variable is opposite to the sign of its coefficient.

[a,b] Significant at the 10%, 5%, and 1% levels, respectively.

employment is reduced can be estimated by comparing it at two levels of enforcement. For instance, doubling enforcement to its mean (2.8 complaints per 10,000 employees) reduces relative employment in professional occupations by 11.3 per cent from .0111 to .0100; quadrupling enforcement to its mean reduces relative employment by 25 per cent. This overall negative effect of Title VII on the relative employment of black professionals is related to the negative effect of the wage provision (panel II, column 5).

In light of past patterns of discrimination, the disparity in the effects of the employment and wage provisions among occupations is not surprising. Blacks have traditionally faced the most severe barriers to entry in the managerial, sales, and crafts occupations; consequently, the EEOC probably enforced the employment provision more widely than the wage provision in these occupations. Black-to-white employment ratios have been higher in the professional, office and clerical, and laborer occupations; thus, in these occupations, enforcing the wage provision was probably relatively more prevalent. And, the results reflect this situation. The employment provision predominates, so that overall enforcement of Title VII increased the relative employment of black officials and managers (column 2); as for black craftsmen, though enforcing Title VII had no overall effect, its employment provision significantly affected relative employment (panel II, column 16). For the professional and office and clerical occupations, the wage provision predominates, so that overall enforcement of Title VII decreased relative black employment (columns 5 and 14); as for black laborers, though enforcing Title VII had no overall effect, its wage provision significantly affected relative employment (panel II, column 22). Across occupations, the direction of change in relative employment (panel I) seems to depend upon how strongly the EEOC enforces the wage provision relative to the employment provision; the direction is positive when the employment provision is likely to have been more strongly enforced, and negative when the wage provision is emphasized.

Bearing in mind (1) that these matched sample estimates may be biased upward because the most discriminatory firms are likely to move to evade enforcement, and (2) that we have yet to establish whether relative black employment and enforcement were systematically related prior to the enactment of Title VII, we will investigate the effects of enforcing Title VII further using the census data.

B. *The Effect of Enforcement on Employment in the Economy*

Table 3 presents GLS and TSLS coefficients on the enforcement variables from log-linear equations on the change in the relative employment of black males in the economy from 1960 to 1970, from 1950 to 1960, and on the ratio

of the former to the latter change. Except for the dummy and enforcement variables, PFC, and PEMCOV (see Table 1 for variable definitions), the independent variables in the ratio equation are also ratios. (The 1960–1970 equation is discussed in the Appendix.)

According to the ratio estimates, the short-run adjustment elasticity of relative black employment in the economy with respect to the overall incidence of enforcement is negative but insignificant (columns 7 and 8). Further, a negative effect from enforcing the wage provision outweighs a positive effect from enforcing the employment provision (column 9). Consistent with the hypothesis that learning occurs at an increasing rate as enforcement becomes more widespread are the findings that the most significant of the pretest estimators is nonlinear for both provisions (column 9). Although enforcement and relative employment are unrelated in the preenforcement equation, 1950–1960 (columns 5 and 6), relationships that are nonmonotonic in the 1960–1970 equation (columns 3 and 4) become monotonic in the ratio equations (columns 9 and 10). So in part, the covered-sector estimates may reflect a prior relationship between enforcement and changes in relative black employment.

From the results so far, we can draw the following conclusions. The way in which relative black employment changes in relationship to the enforcement of Title VII's provisions (Tables 2 and 3) implies that (1) compliance with the employment provision increased the employment of black males relative to white males more than alternative responses reduced it, and (2) the wage provision reduced relative employment in covered firms by more than could be absorbed in the rest of the economy. Alternatively, firms could have successfully avoided the wage provision's coverage. We also find that enforcing the wage provision counteracted the benefits of the employment provision, so that overall enforcement of Title VII left relative employment in the economy unchanged. But enforcing Title VII did significantly change relative black employment in covered firms, the direction of change differing among occupations.

III. Empirical Analysis: Relative Wages

We can estimate the effects of enforcing Title VII on the relative wages of nonwhite males in the economy using data from the U.S. Bureau of the Census.[21] Our model of relative wages has appeared previously in empirical literature on discrimination,[22] derived from the work of Becker, it specifies

[21] Analyzing the wages of nonwhite rather than black males is necessitated by the categories of the 1960 census from which the data are taken. In 1960, more than 90% of nonwhites in the United States were black. 1 U.S. Bureau of the Census, 1960 Census of Population, pt. 1, at xlii.

[22] William M. Landes, The Effect of State Fair Employment Legislation on the Economic

TABLE 3

COEFFICIENTS AND SIGNIFICANCE OF INCIDENCE OF ENFORCEMENT VARIABLES FROM LOG-LINEAR REGRESSION EQUATIONS ON THE CHANGE IN TOTAL RELATIVE BLACK EMPLOYMENT FROM 1960-1970 AND 1950-1960, AND ON THE RATIO OF THESE CHANGES, FOR THE UNITED STATES

	Estimated Coefficients and *t*-statistics									
	1960-1970				1950-1960		Ratio of Changes			
	LS (1)	TSLS (2)	LS (3)	TSLS (4)	LS (5)	LS (6)	LS (7)	TSLS (8)	LS (9)	TSLS (10)
ln CHG1	...	...	...	...	...	...	−.028 (1.67)	−.019 (0.80)	...	...
ln CHG1²	.0013† (0.93)	−.0010 (0.31)	...	...	−.0002 (0.22)	...	...	...	...	...
ln EMCHG1	...	...	−.446 (2.39)**	−.843 (1.60)	...	−.035 (1.13)	...	...	...	...
ln EMCHG1²	...	...	−.026 (2.45)**	−.051 (1.77)*	...	...	...	...	−.002 (1.14)	−.0078 (1.49)
ln WACHG1	...	...	.352 (2.38)**	.573 (0.93)	...	.044 (1.31)	...	...	...	...
ln WACHG1²	...	...	.020 (2.69)**	.033 (1.01)	...	...	...	...	.003 (2.16)**	.0079 (1.45)
Degrees of freedom	28	...	22	...	30	26	29	...	25	...
F-test for enforcement	...	...	$F(4,22)=$ 3.45**	...	...	$F(2,26)=$ 0.93	...	...	$F(2,25)=$ 3.20*	...

Source: See Table 1 *supra* and Andrea H. Beller, *supra* note 1, at app. A. The data for the 1950–1960 equations are taken from the 1950 and 1960 censuses.

Note: The RLS preliminary-test estimators presented in this table are those with the highest (joint) significance according to the conventional *F*-statistic.

*,** Significant at the 10% and 5% levels, respectively.

† The square of the logarithm of the incidence of enforcement is inversely related to the logarithm; hence, this coefficient implies a negative effect of enforcement on the dependent variable.

the relative wages of nonwhites as a linear function of their relative numbers and of several shift parameters, including in this case the enforcement of Title VII.[23] We estimate equations in which each of the variables is measured as a percentage change from 1959 to 1969 or from 1949 to 1959, except for the dummy and enforcement variables. A value for each of the variables is assigned to each state. (The complete 1959–1969 equation, along with variable definitions, appears in the Appendix.)

OLS coefficients on the enforcement variables from the 1959–1969 percentage-change equations appear in columns 1 and 2 of Table 4.[24] Increasing Title VII's enforcement reduces the percentage change in relative wages more than proportionately (column 1); however, the coefficient is insignificant. Evaluated at its mean, enforcement reduces the percentage change in relative wages by 9.5 per cent.[25] Accounting for this overall decrease in relative wages is a linear negative effect from enforcing the wage provision which outweighs a more than proportionate positive effect from enforcing the employment provision (column 2). The estimated coefficients, significant at the 1 per cent and 10 per cent levels respectively, are jointly significant at the 5 per cent level.[26]

In order to determine whether relative wages differed systematically among the states prior to Title VII's enactment, the equations should be estimated for the preenforcement decade. Since the data are not available to estimate wages in 1949, income is used as a proxy for wages. Columns 3 through 8 of Table 4 contain coefficients on the enforcement variables from equations on the percentage change in the ratio of nonwhite-male annual income to white-male annual income from 1959 to 1969, 1949 to 1959, and on the ratio of the former to the latter change. The independent variables in

Position of Nonwhite Males (1966) (unpublished Ph.D. dissertation, Columbia Univ.); Orley Ashenfelter, Racial Discrimination and Trade Unionism, 80 J. Pol. Econ. 435 (1972).

[23] Gary S. Becker, The Economics of Discrimination (2d ed. 1971).

[24] For the reason mentioned previously, a simultaneous-equation model in which enforcement is a function of the change in relative wages was also estimated. The reduced-form equation for enforcement is described in note 16 *supra*. While the TSLS estimates show no significant differences from the single-equation estimates, they do increase the significance of positive coefficients on the enforcement variables relative to that of negative coefficients.

[25] The mean percentage change in relative wages from 1959 to 1969 was 7.62%. This value was 0.8 percentage points lower than it would have been had the incidence of enforcement been equal to zero. The values for a 95% confidence interval around this point ranged between a reduction of 2.1 percentage points and an increase of 0.5 percentage points.

[26] William M. Landes, The Economics of Fair Employment Laws, 76 J. Pol. Econ. 507 (1968), found that through 1959 state fair-employment laws had a small positive effect on the relative wages of nonwhite males; but he also found that these laws increased the nonwhite-white unemployment differential. We find that Title VII had the opposite effect from state fair-employment laws on relative wages; but our finding that Title VII reduced relative employment is similar to what Landes found. And both sets of results are consistent with the theory presented above: the effect of the wage provision on relative wages is ambiguous, but its effect on relative employment (unemployment) is expected to be negative (positive).

TABLE 4

COEFFICIENTS AND SIGNIFICANCE OF INCIDENCE OF ENFORCEMENT VARIABLES FROM REGRESSION EQUATIONS ON THE PERCENTAGE CHANGE IN THE RATIO OF NONWHITE-TO-WHITE MALE WAGES FROM 1959–1969 AND ANNUAL INCOME FROM 1959–1969, 1949–1959, AND ON THE RATIO OF THESE CHANGES, FOR THE UNITED STATES

	Estimated Coefficients and *t*-statistics							
	Wages		Annual Income					
	1959-1969 (OLS)		1959-1969 (TSLS)		1949-1959 (OLS)		Ratio of Changes (TSLS)	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
CHG2	...	...	...	...	$-.256 \times 10^2$	...	$-.141 \times 10^3$	...
					(0.67)		(1.36)	
$CHG2^2$	$-.318 \times 10^5$	...	$-.341 \times 10^5$	...	...	...	...	...
	(1.24)		(0.94)					
EMCHG2	...	...	...	...	...	$-.743 \times 10^3$	...	...
						(1.78)*		
$EMCHG2^2$	...	$.222 \times 10^5$	...	$.572 \times 10^6$	...	$.653 \times 10^6$	...	$.421 \times 10^6$
		(1.70)*		(1.60)		(1.45)		(0.67)
WACHG2	...	$-.476 \times 10^3$	...	$-.789 \times 10^3$	...	$.922 \times 10^3$	...	$-.730 \times 10^3$
		(3.14)***		(2.13)**		(1.82)¶		(1.30)
$WACHG2^2$	...	...	...	...	...	$-.904$	...	...
						(1.78)*		
R^2	.636	.703	...	...	.419	.472	...	...
F-test for enforcement	...	$F(2,37)=5.06$**	...	...	...	$F(4,37)=1.06$	...	...

Source: See Table 5 *infra;* Andrea H. Beller, *supra* note 1; and William M. Landes, *supra* note 22.

Note: The regressions in this table include all states except Alaska and Hawaii. The District of Columbia is also excluded because of the large number of nonwhites employed by the federal government. The R^2s are unadjusted.

The OLS preliminary-test estimators presented in this table are those with the highest (joint) significance according to the conventional *F*-statistic. The TSLS estimators are those with the largest *t*-statistics. In all cases, except column (6), the unrestricted estimators gave an unambiguously inferior fit.

*,**,*** Significant at the 10%, 5%, and 1% levels, respectively.

the ratio equations are expressed as the ratio of percentage changes, except for the dummy and enforcement variables, which enter as in previous equations. The coefficients from the 1959–1969 and the ratio equations are estimated by TSLS; these coefficients differed significantly (were more positive) from the ones estimated by OLS.[27]

According to columns 3 and 4, enforcement affected changes from 1959 to 1969 in relative income similarly—both in direction and in form—to changes in relative wages; only the effects are less significant.[28] Since Title VII's enforcement is unrelated to preenforcement changes in relative income (columns 5 and 6), the coefficients in the 1959–1969 income (and wage) equations can be properly interpreted as measuring the effects of enforcement. Moreover, although insignificant at conventional test levels, these effects recur in the ratio equations (columns 7 and 8). In these equations, the coefficients on the employment and wage provision variables show the same direction, magnitude, and form as in the 1959–1969 change equation (columns 4 and 8).

Despite varying data bodies and functional forms, one finding consistently emerges. Enforcement of Title VII's provisions affects relative black employment and wages in the same opposing directions: the employment provision increases them and the wage provision decreases them. These results are consistent with the following observations. The increase in the relative employment of black males caused by the employment provision was not merely a transfer of blacks from uncovered to covered firms. The concomitant increase in relative wages means that covered firms bid up black wages and/or hired blacks into higher-wage jobs. The reduction in relative wages caused by the wage provision means that while it may have increased the wages of some blacks in covered firms (this could not be tested with available data), the wage provision also created an excess supply of black labor and/or its coverage was successfully avoided by firms. An example of the latter would be the following. If firms moved into capital rather than pay blacks higher wages and whites were more complementary to capital than blacks, then relative black employment and wages would fall. Over the period studied, the effect of the wage provision counteracted that of the

[27] See note 24 *supra*.

[28] Enforcement affects relative annual income less than relative weekly wages because it affects relative weeks worked in the opposite direction from relative annual earnings. The TSLS estimates showing the effect of the provisions on the percentage change in relative weeks worked follow, with their t-statistics in parentheses: $-.348 \times 10^{6}$ EMCHG2[2] (1.82) and $.410 \times 10^{3}$ WACHG (2.03). These results may be explained as follows. We have found that enforcing the employment (wage) provision increased (decreased) relative nonwhite employment and wages. Now if those nonwhites entering (dropping out of) the labor force had weaker attachments than those already in (remaining in), they would work fewer weeks per year on the average; this would cause average weeks worked to decrease (increase).

TABLE 5
LIST OF VARIABLES USED IN WAGE ANALYSIS

Variable Name	Definition
RWAGE	The ratio of nonwhite- to white-male average wages. The average wage of nonwhite (white) males in each state is estimated by average annual earnings of nonwhite (white) males divided by average weeks worked of nonwhite (white) males[a]
RINC	The ratio of nonwhite- to white-male average annual income[b]
RNUM	The ratio of nonwhite to white males in the civilian labor force
RED	The ratio of mean years of school completed of nonwhite to white males over 15-years of age and not enrolled in school, a proxy for the ratio of marginal products
RURBAN	The proportion of nonwhite males in urban areas divided by the proportion of white males in urban areas. Males not in the civilian labor force are excluded
URBAN	Proportion of all males in urban areas. Males not in the civilian labor force are excluded
SOUTH	Same as in Table 1
FEPC58	Dummy variable assigned a value of one for states with Fair Employment Practices commissions established in 1959 or later and zero elsewhere
FEPCA58	Dummy variable assigned a value of one for states with Fair Employment Practices commissions established prior to 1959 and zero elsewhere
UNION	Same as in Table 1 for 1970. The figure for 1960 was approximated by a simple average of figures for 1953 and 1964[c]
CHG2, EMCHG2, and WACHG2	Same as in Table 1 excluding data for fiscal year 1970 since enforcement in the latter half of the fiscal year would not affect relative wages in 1969.

Sources: Data are from 2 U.S. Bureau of the Census, United States Census of Population: 1950, pts. 1-50 (1953); *id.*, 1960, pts. 1-52 (1963); and *id.*, 1970 (1973), unless otherwise noted. The sources of the 1969-1970 data are discussed in detail in Andrea H. Beller, *supra* note 1, at app. A; those of the 1949-1950 and 1959-1960 data are discussed in William M. Landes, *supra* note 22, at app. A.

[a] As William M. Landes, *supra* note 22, pointed out, the ratio of these measures is more correctly an estimate of relative weekly earnings.

[b] Data not available from the censuses are from William M. Landes, *supra* note 22, at app. A.

[c] Data for 1953 are from Leo Troy, Distribution of Union Membership Among the States, 1939 and 1953 (1957) (Occasional Paper 56, Nat'l Bureau Econ. Research); and data for 1964 are from U.S. Dep't of Labor, Bureau of Labor Statistics, Bull. 1665, Directory of National and International Labor Unions in the United States: 1969 (1970).

employment provision, resulting in an adverse overall impact of Title VII on the relative economic position of black males; however, this overall impact is statistically insignificant.[29] Finally, the nonlinear effects that we find on

[29] Although insignificant in these estimates, the overall negative effect that enforcing race-discrimination charges has on relative black wages persists in more recent data. Estimates presented in Andrea H. Beller, EEO Laws and the Earnings of Women, in Proceedings of the 29th Annual Meeting, IRRA 190-98 (1977), show that enforcing Title VII through 1974 had a significant negative effect on the 1974 earnings of black females. Notably, this negative effect disappears when industry and occupation are controlled for; so enforcement reduced earnings not within industries and occupations but by causing blacks to move between them. Both sets of

Title VII's provisions are consistent with the hypothesis that firms learn about enforcement more rapidly as it becomes more prevalent.

IV. Conclusion

An inherent conflict makes it difficult, if not impossible, for equal employment opportunity laws to eliminate both employment and wage discrimination simultaneously. Complying with the laws' wage provision sets up an incentive for competitive firms to reduce relative employment, but complying with the employment provision requires them to increase it. Because of this conflict, enforcing these laws may make the minority group even worse off.[30]

Title VII's overall effects on the relative economic position of black males closely and consistently approximate the combined effects of its employment and wage provisions. Enforcing the employment provision increased both relative black employment and wages, while enforcing the wage provision decreased them; furthermore, during the period from 1960 to 1970, the effects of the wage provision were stronger. The enforcement of Title VII as a means to combat racial discrimination must be characterized as unsuccessful during the sixties, for the combined effect of its provisions was to reduce, albeit insignificantly, relative black employment and wages.

Appendix

In this appendix, we present the equation on the change in relative black employment in the economy between 1960 and 1970 and discuss the effects of the important independent variables other than Title VII. We also discuss their effects on the change in relative employment by occupation in the covered sector between 1966 and 1970. The equation on the percentage change in the relative wages of nonwhite males in the economy between 1959 and 1969 is also presented without discussion.

The relative employment equation is as follows:

$$\underset{(0.61)}{.006} + \underset{(0.90)}{.023}\text{EMPL} - \underset{(0.61)}{.190}\text{CEMPL} + \underset{(1.45)}{.312}\text{PPB} + \underset{(2.50)}{.628}\text{CPPB} + \underset{(0.91)}{.065}\text{GMR}$$

$$- \underset{(0.12)}{.052}\text{RED} + \underset{(0.75)}{.052}\text{UNEMPL} - \underset{(0.19)}{.020}\text{CUNEMPL} + \underset{(1.64)}{.255}\text{PFC} + \underset{(1.81)}{1.108}\text{PEMCOV}$$

$$+ \underset{(0.93)}{.001}\text{CHG1}^2 + \underset{(0.07)}{.006}\text{FEPC64} - \underset{(0.58)}{.043}\text{UNION} - \underset{(0.31)}{.215}\text{SMSA} + \underset{(0.31)}{.027}\text{SOUTH}$$

$$- \underset{(1.54)}{.179}\text{MFG} + \underset{(3.52)}{.724}\text{RBE60}.$$

$R^2 = .9971$ Number of observations = 46.

results are consistent with the explanation that enforcing the wage provision counteracts the employment provision and forces some blacks to seek employment at lower wages outside the covered sector.

[30] This possibility was anticipated by Joseph E. Stiglitz, Approaches to the Economics of Discrimination, 63 Am. Econ. Rev. 287 (Papers & Proceedings, May 1973).

We will discuss the effects of (1) other equal employment opportunity legislation, (2) the lagged value of the dependent variable, and (3) the supply variables and South dummy.

(1) The federal contract compliance program (PFC) and state fair-employment laws (FEPC64) are expected to increase the demand for black males relative to white males, thereby increasing relative black employment. PFC is positively related to relative employment in the economy, and its coefficient is significant at the 5 per cent level using a one-tail test. It is also positively related to relative employment in all occupations in the covered sector, and its coefficient is significant at the 5 per cent level for the technical and sales occupations. The coefficient on FEPC64 is positive for total employment and for most occupations in the covered sector, but is significant for the laborer occupation only. The equation for total employment in the economy includes a variable designed to estimate the proportion of employment that is in the covered sector (PEMCOV). While it is positive and significant in the 1960-1970 relative-employment equation, the coefficient on PEMCOV is also positive and significant in the preenforcement equation, 1950-1960. Therefore, instead of the extent of Title VII's coverage, this variable probably represents the effect of large firm size.

(2) The coefficient on the lagged value of the dependent variable (RBE60) is equal to $(1 - \lambda)$, where λ is the adjustment coefficient of relative employment to its target level. While they are significantly different from unity for total employment and for all occupations, these coefficients differ in magnitude. The modal adjustment coefficient is equal to approximately 0.2; they all range between 0.1 for operatives and 0.8 for sales. These lagged coefficients imply that the rate of adjustment is generally lower for blue-collar occupations than for white-collar occupations.

(3) Aside from these, the supply variables are the most important ones. For with the exception of the lagged value of relative employment, PPB is generally the most significant independent variable. Its coefficient is consistently positive. *Ceteris paribus,* the greater the proportion of the state's population that is black, the greater the changes in relative employment. The coefficient on the change in the proportion of the black population (CPPB) is also generally positive and is significant for total relative employment and for relative employment in the technical and operative occupations. The gross migration rate (GMR) is positive and significant for officials and managers and craftsmen. The coefficient on the relative educational level of black males (RED), which entered the equations for white-collar occupations only, is very high and significant for the professional and sales occupations; the short-run adjustment elasticities are 2.4 and 2.6 respectively. These results indicate that an available pool of black labor facilitates changes in their relative employment.

Of particular interest are the consistently positive (except for professional occupations) coefficients on the South dummy in the equations for covered firms; they are significant for craftsmen and operative occupations, and range between .03 for officials and managers and .37 for craftsmen. (The coefficient for professional occupations equals $-.4$ and is significant at the 10 per cent level.) Stated simply, blacks made greater employment gains in covered firms inside than outside the South between 1966 and 1970 in all but professional occupations. Among all firms, while

relative employment changes were not significantly greater in the South, relative wage changes were.

The equation on the percentage change in the ratio of nonwhite to white-male wages from 1959 to 1969 is as follows:

$$\underset{}{.123} + \underset{(1.99)}{.103}\text{RNUM} + \underset{(1.22)}{.783}\text{RED} - \underset{(2.07)}{.173}\text{RURBAN} - \underset{(1.77)}{.921}\text{URBAN} + \underset{(4.35)}{.119}\text{SOUTH} - \underset{(2.68)}{.161}\text{FEPC58} - \underset{(3.46)}{.111}\text{FEPCA58} - \underset{(2.81)}{.208}\text{UNION} - \underset{(1.33)}{.318 \times 10^{5}}\text{CHG2}^{2}. \quad (1.24)$$

$R^2 = .636$ Number of observations = 48.

NEWS

SENATOR MAX BAUCUS

FOR RELEASE: IMMEDIATE
February 25, 1988

Contact: Suzanne Lagoni
202 224-2651

SPECIAL TO STEVE WOODRUFF, THE MISSOULIAN, ON NOMINATION OF BERNARD SIEGAN TO NINTH CIRCUIT COURT OF APPEALS

This week the Senate Judiciary Committee began hearings on a judicial nomination that could have a profound impact on Montana--almost as important as the recent hearings for a Supreme Court justice. President Reagan has nominated Bernard Siegan, a professor at the University of San Diego Law School, to the Ninth Circuit Court of Appeals. The Ninth Circuit is the largest in the country, comprising nine western states. It hears virtually all appeals of cases coming from Montana federal district courts.

For all practical purposes, the court of appeals is the court of last resort. In the fiscal year 1986, federal courts of appeals processed almost 34,000 cases. When you consider that the Supreme Court reviews fewer than 150 cases each year, the critical importance of appointments to the appeals court becomes starkly apparent. While Supreme Court justices interpret the law, and appeals court judges apply those interpretations, it would be irresponsible for us to confirm a nominee to the appeals court with the idea that their mistakes could be corrected by the Supreme Court.

Mr. Siegan has been a professor of law since 1971. Before that he spent 24 years in private practice with much of his time devoted to real estate development and real estate law. He has never appeared before the Ninth Circuit or any district courts in that circuit. He has appeared only occasionally in any court and most appearances were at the state level. In addition, the American Bar Association has rated Siegan only as "qualified" -- their lowest possible passing grade for a federal judicial nominee. While these factors alone are not sufficient to reject his nomination, they do suggest that the remainder of Professor Siegan's record must be carefully examined.

And it's that record that has caused Professor Siegan's nomination to become very controversial. Many groups have claimed that his judicial philosophy as reflected in his writing is inimical to the best interests of the American people. They cite with particular concern his recent book on the Constitution and the rule of the courts, "The Supreme Court's Constitution." Quite frankly, some of Professor Siegan's views that are expressed in this book cause me grave concerns as well.

For example, Professor Siegan seems to believe that the Constitution affords no remedy for any form of discrimination. He also has suggested that the First Amendment does not prohibit the states from establishing or advancing the interests of a particular religion. In addition, he seems to believe that only Congress is forbidden by the First Amendment from restricting free speech. He implies that the Executive, as well as the states, can limit free expression.

Finally, and most troubling of all, Professor Siegan suggests that the federal government and the states do not have the authority to regulate business or the economy. I take that to mean that he finds most forms of economic regulation to be impermissible. For example, restricting the use of land for wilderness or other recreational uses would be beyond the authority of the states and the federal government. Most environmental regulations on clean air, clean water, and the disposal of toxic wastes would fail, as would labor laws and minimum wage laws.

Professor Siegan's nomination is floating on troubled waters. That is why the Judiciary Committee's hearings are so important. It's difficult to believe that Professor Siegan's philosophy as expressed in his writings will not carry over to his decisions as a judge. His views raise ominous red flags. He will have to go a long way during his confirmation hearings to show that he would be the kind of judge in whom we should trust our constitutional protections.

Steve: Max served on the Judiciary Committee for six years, from 1979-85.

The Florida State University
Tallahassee, Florida 32306-1034

College of Law

February 22, 1988

Senator Joseph Biden
Senate Judiciary Committee
Dirksen Senate Office Building
Washington, DC 20510

Attention: Steve Metalitz

Dear Senator Biden:

I would like to register my objection to the nomination of Professor Bernard Siegan to the U.S. Court of Appeals. My only hesitancy in registering this objection is because Professor Siegan is a very gentle, soft-spoken person who, I know, has had some personal tragedies in his life.

Nevertheless, because of my exposure to some of his writings in the field of land use planning and law and my concern that those views may reflect an attitude in other fields of law, I must object.

My practice (before I retired in 1982 to teach) has been almost exclusively in the field of land use law. I enclose a biography. I knew Professor Siegan in Chicago and, many years ago, used to debate with him on some radio and TV shows. I have read a good deal of his writing in this field, particularly his book on the merits of no zoning in Houston. He believes that Houston because it has no zoning is the great success story of American cities. Professor Siegan believes land use regulation (except for nuisances) should be abolished and growth left solely to the market place.

I know there are some persons in academia who share this belief and this view is entitled to be heard. But it is so far "out" and a distortion of what most Americans believe that I would be frightened to see that reflected on a distinguished Federal court. Land use regulation is relatively recent -- 1916 -- but it is the one field of municipal government that the average person believes he or she understands and to say we should return to the condition of the 19th century would meet with overwhelming opposition not only in our many suburbs but in our large cities as well.

I realize few land use cases reach the U.S. Courts of Appeal but what concerns me is that this "activist" ultra conservative point of view would extend beyond this one field and that Professor Siegan would not even be what some have called a "strict constructionist."

Please accept this note as evidence of my deep concern and I urge your committee to reject this nomination.

Very truly yours,

Richard F. Babcock
Visiting Professor

RFB:ew

RICHARD F. BABCOCK

Ross & Hardies
150 North Michigan Avenue
Suite 2500
Chicago, Illinois 60601
(312) 558-1000

A graduate of Dartmouth College (A.B., magna cum laude, Phi Beta Kappa, 1940), the University of Chicago Law School (J.D., cum laude, Editor in Chief, Law Review; Order of Coif, 1946), and the University of Chicago School of Business (M.B.A., 1950). Member of American Institute of Certified Planners.

Mr. Babcock was a governor's appointee to the Northeastern Illinois Planning Commission from 1965-72 President of the American Planning Association, 1971-72; Chairman of the Advisory Committee of the American Law Institute Project on a Model Land Development Code from 1965-1975; and Chairman, Governor's Commission on Clean Air Act. He was a member of the American Bar Association Advisory Commission on Housing and Urban Growth, and was an adjunct professor in the College of Urban Sciences, University of Illinois (Circle Campus), Chicago. He has lectured at Harvard University, Northwestern University, University of Chicago, University of Wisconsin, Georgia Tech, University of Tennessee, Golden State University, UCLA, University of California (Berkeley). He has organized four courses on land use litigation for the American Law Institute.

Mr. Babcock has been a consultant to public agencies and private developers in land use and housing. He was a visiting professor at Santa Clara Law School in 1982 and at Dartmouth College, Hanover, New Hampshire, in the fall of 1982. In 1983 he spent four months lecturing in Australia and New Zealand. In 1984, '85 and '86 he was a professor at Duke University. In 1985 he taught at the University of Michigan Law School, and in 1987 he taught at Northern Illinois University.

Mr. Babcock is the author of five books: The Zoning Game (University of Wisconsin Press, 1966); The Zoning Game Revisited (with Charles L. Siemon, 1985); Billboards, Glass Houses and the Law, (McGraw Hill, 1977); co-author with Clifford Weaver of City Zoning: The Once and Future Frontier (1980); and with Fred P. Bosselman of Exclusionary Zoning: Land Use Regulations and Housing in the 1970s (Praeger Press, 1973), as well as author of numerous articles on land use regulation and planning. These include "The Egregious Invalidity of the Exclusive Single Family Zone," 35 Land Use Law 4 (July, 1983); "Land as a Commodity 'Affected With a Public Interest'," (with Duane Feurer) 52 Wash. L. Rev. 289 (1977); "Let's Stop Romancing Regionalism," Planning (ASPO, 1972); "The Courts Enter the Land Development Market Place," CITY Magazine (January, 1971); "Billboards, Glass Houses and the Law," (Harper's Magazine, April, 1967); "Citizen Participation: A Suburban Suggestion for the Central City," (with Fred P. Bosselman), 32 Law & Contemporary Problems 220 (1967); "An Introduction to the Model Enabling Act for Planned Residential Development," 114 U. Pa. L. Rev. 136 (1965); "Suburban Zoning and the Apartment Boom," (with Fred P. Bosselman), 111 U. Pa. L. Rev. 1040 (1963); "British and American Planning Administration: Two 'Raisons' in

Search of Common 'd'Etre'," 15 Zoning Digest 145 (1963); "The Chaos of Zoning Administration: One Solution," 12 Zoning Digest 1 (1960); "The Unhappy State of Zoning Administration in Illinois," 26 U. Chi. L. rev. 509 (1959); "The New Chicago Zoning Ordinance," 52 Nw. U. L. Rev. 174 (1957); "Classification and Segregation Among Zoning Districts," 154 U. Ill. L. F. 186.

June 1, 1987

FIFTEENTH FLOOR
400 SOUTH HOPE STREET
LOS ANGELES 90071-2899

February
24th
1 9 8 8

(213) 669-6260

The Honorable Joseph R. Biden, Jr.
Senate Judiciary Committee
The United States Senate
Washington, D.C. 20510

Re Nomination of Bernard Siegan
To the United States Court of Appeals
For the Ninth Judicial Circuit

Dear Senator Biden:

I write to express my deep concern over the nomination of Bernard Siegan to a seat on the Ninth Circuit Court of Appeals, and to urge in the strongest terms that the nomination be rejected.

By way of introduction, I am a partner in the law firm of O'Melveny & Myers in Los Angeles. I am a 1973 graduate of Stanford Law School, where I was elected to Order of the Coif and served as class president. I am a member of the California and New York bars. In my fifteen years of practice, I have specialized in First Amendment litigation and have represented broadcasters (including NBC and CBS), newspaper and magazine publishers (including Time Inc., E.W. Scripps Company, and The Copley Press), and individual authors and journalists in libel, privacy and other First Amendment related litigation. I have also represented a number of religious organizations in suits involving the free exercise and establishment clauses of the First Amendment.

It is my profound reverence for the principles embodied in the First Amendment that leads me to oppose, so strongly, Professor Siegan's nomination to this important judicial position. For Bernard Siegan has a view of the First Amendment so limited that is not simply unique, but

bizarre, and one which is profoundly dangerous to our fundamental liberties. A few examples, I believe, will demonstrate the soundness of that conclusion:

Professor Siegan has, in his writings, forcefully expressed the view that the Establishment Clause of the First Amendment was not incorporated into the guarantees of the Fourteenth Amendment, and is thus inapplicable to the states. He holds to the curious view that the federal constitution "safeguards the powers of the states to sponsor or further religions of their own choosing." The implications of this view -- unique in contemporary American jurisprudence -- are nothing short of astounding. To Mr. Siegan, there is nothing in the United States Constitution which would prevent, for example, Utah from making Mormonism the official state religion, supported by public taxation.

Professor Siegan also holds the view that the First Amendment places no limitation on the Executive or Judicial branches abridging freedom of speech or the press. In this he is what I would term a "selective literalist" in his interpretation of the amendment. Professor Siegan has no trouble ignoring the literal words of certain portions of the free speech and press clause: to him the words, "Congress shall make no law abridging the freedom of speech or of the press", certainly do not mean "no law". But the first word of the Amendment is to be interpreted literally. Thus to Siegan, the First Amendment "clearly restrains only Congress and no other branch or institution." Under this view -- again unique in contemporary American jurisprudence -- the unanimous 1971 decision of the Supreme Court holding that the First Amendment barred an injunction sought by President Nixon against publication of the "Pentagon Papers" was wrong. Reasons Professor Siegan: "The only branches of government involved in this controversy were the executive which sought the restraining order and the judicial branch which was requested to grant it. The first amendment does not by its terms apply to either of these branches." Equally wrong, under this unique analysis would be the Ninth Circuit's more recent (and again, unanimous) holding that the district court could not, under the First Amendment, prevent CBS from broadcasting the tapes of John DeLorean's cocaine transaction.

Not surprisingly, Siegan is contemptuous of the Supreme Court's recognition of First Amendment protection for the press against unrestricted liability under state defamation laws. There is certainly a wide latitude of views over the extent of protection which the First Amendment gives to the press in its vital role of reporting

matters of legitimate public interest: At one extreme is the late Justice Black's absolutist position that the Amendment bars any liability for defamation; among the more current views is the 1971 Rosenbloom plurality's view that the press enjoys the protection of the New York Times v. Sullivan "actual malice" standard whenever it reports on matters of public concern; there is also the more limited view of the 1974 Supreme Court decision in Gertz v. Welch that a negligence standard is all that is mandated by the First Amendment when the press reports on "private figures", even those involved in public events.

Professor Siegan holds to none of these mainstream judicial views. Again we find him at the other extreme in his view that the First Amendment provides no protection whatsoever for the press against defamation liability. To him, there is "little support for the Sullivan or Gertz decisions", which he dismisses as another instance where "the justices again implemented their own concerns and values."

Professor Siegan's views on constitutional protection of freedom of speech, press and religion are colored by his basic premise that, "The First Amendment is quite limited in scope." To Siegan, "the Bill of Rights did not affect the common law rights that the people already possessed under the Constitution. Thus, the First Amendment's guarantee of free expression did not expand or limit this freedom since the provision was likewise definable under the common law." Hence to Siegan the First Amendment -- which Justice Black called "the foundation of free government" -- was meant as nothing more than a restatement of existing English common law rights. "Clearly," Siegan tells us, "the First Amendment did not originate as a great bastion of freedom."

Siegan's view that the First Amendment was meant merely to embody existing English common law was refuted by Madison himself, the chief author of the amendment. Madison wrote that the rights of speech and press "under the common law cannot . . . be the standard of its freedom in the United States." As the United States Supreme Court held in 1941 in Bridges v. California, "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed."

A judicial nominee who believes that the First Amendment permits state establishment of official religions, permits the President to bar newspapers from publishing

reports on matters of the most vital public concern, permits judges to decide what can be broadcast on television news, is not merely "unqualified" to serve. We simply cannot entrust the protection of our most fundamental liberties to a judge with such a limited view of our Bill of Rights.

I urge you in the strongest possible way to reject the nomination of Bernard Siegan to the Ninth Circuit Court of Appeals.

I wish to stress that the views expressed in this letter are mine personally, and not those of my law firm or any other lawyer in it, nor am I speaking on behalf of any client of mine or my firm.

Very truly yours,

Robert C. Vanderet

Robert C. Vanderet

RCV:dlg

Board of Directors
Robert E. Borton, Co-Chair
Neil O'Donnell, Co-Chair
Mary Jo Bane, Finance Chair
Robert A. Thompson, Secretary
Bernard Zimmerman, Treasurer
William F. Alderman
William Alsup
David Andrews
Alice M. Beasley
Al Bendich
William S. Boyd
Alexander Brainard
Richard C. Dinkelspiel
Robert L. Harris
John Harwell
Terry Hatbeab
Gordon J. Lau
Michael G. W. Lee
Judith McKelvey
William C. Mitchell, III
Patricia Bauer Schember

San Francisco
Lawyers' Committee
For Urban Affairs

301 MISSION STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94105
(415) 543-9444

Staff
Mark H. Aaronson, Executive Director
Eva Jefferson Paterson, Assistant Director
Marcos Rosen, Assistant Director
Michael Harris, Staff Attorney
Eunice F. Foster, Administrator

Immigrant and Refugee Rights Project
Robert Rubin, Managing Attorney
Ignatius Bau, Staff Attorney
Kate T. McGrath, Staff Attorney
Leslie Simon, Staff Attorney
David Rorick, Legal Assistant

MAR 22 RECD

Resolution of the San Francisco Lawyers' Committee
In Opposition to the Nomination of Bernard Siegan to the
Ninth Circuit Court of Appeals

WHEREAS, the San Francisco Lawyers' Committee for Urban Affairs is an organization devoted to advancing civil rights, including the rights to adequate housing, employment, social services, education, health care, economic security and fair treatment within the criminal justice system;

WHEREAS, the San Francisco Lawyers' Committee is committed to ensuring due process, equal protection under the law and full and equal access to the courts for all persons;

WHEREAS, the Ninth Circuit Court of Appeals is the court of last resort in which to enforce civil rights for many people of color, low-income individuals, immigrants and refugees and other underrepresented individuals served by the San Francisco Lawyers' Committee;

WHEREAS, Bernard Siegan has written that the equal protection clause does not protect minorities and women from state discrimination in education, voting, jury service and holding office;

WHEREAS, taking issue with longstanding U.S. Supreme Court precedent, Bernard Siegan has stated that the equal protection clause does not protect black children from school segregation laws;

WHEREAS, Bernard Siegan adheres to a view that laws protecting workers against health, safety, and environmental dangers must yield to the property rights of their employers, a view rejected fifty years ago by the Supreme Court;

WHEREAS, Bernard Siegan has called upon the courts to invalidate minimum wage laws and other labor and economic regulations, a role described by Judge Robert Bork as "beyond any function that can conceivably be called judicial;"

WHEREAS, Bernard Siegan has advocated constitutional principles which would reduce access to the courts by the minorities and poor persons served by the San Francisco Lawyers' Committee thereby hampering these individuals' ability to seek redress for violations of their fundamental rights;

BE IT RESOLVED, that, because Bernard Siegan's views are so far outside the mainstream of judicial thinking, the San Francisco Lawyers' Committee for Urban Affairs opposes the confirmation of Bernard Siegan as a judge of the Ninth Circuit Court of Appeals and urges the United States Senate to reject his nomination.

JOSEPH R. BIDEN, Jr., DELAWARE, CHAIRMAN
EDWARD M. KENNEDY, MASSACHUSETTS
ROBERT C. BYRD, WEST VIRGINIA
HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZONA
PATRICK J. LEAHY, VERMONT
HOWELL HEFLIN, ALABAMA
PAUL SIMON, ILLINOIS
STROM THURMOND, SOUTH CAROLINA
ORRIN G. HATCH, UTAH
ALAN K. SIMPSON, WYOMING
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
GORDON J. HUMPHREY, NEW HAMPSHIRE
MARK H. GITENSTEIN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
TERRY L. WOOTEN, MINORITY CHIEF COUNSEL
R.J. DUKE SHORT, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 18, 1988

Mr. Bernard H. Siegan
University of San Diego School of Law
Alcala Park
San Diego, California 92110

Dear Professor Siegan:

As you know, Senator Biden is out of the office due to illness; however, he is doing well and will be back full-strength in the Senate after his recuperation.

In his absence, I am forwarding a letter from Senator Leahy, which includes some follow-up questions to you from committee members.

Thank you for your cooperation.

Sincerely,

Diana Huffman

Diana Huffman
Staff Director

EDWARD M. KENNEDY, MASSACHUSETTS
ROBERT C. BYRD, WEST VIRGINIA
HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZONA
PATRICK J. LEAHY, VERMONT
HOWELL HEFLIN, ALABAMA
PAUL SIMON, ILLINOIS

STROM THURMOND, SOUTH CAROLINA
ORRIN G. HATCH, UTAH
ALAN K. SIMPSON, WYOMING
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
GORDON J. HUMPHREY, NEW HAMPSHIRE

MARK H. GITENSTEIN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
TERRY L. WOOTEN, MINORITY CHIEF COUNSEL
R.J. DUKE SHORT, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 18, 1988

Mr. Bernard H. Siegan
University of San Diego
School of Law
Alcala Park
San Diego, CA 92110

Dear Mr. Siegan:

At the hearing held on February 25 on your nomination to be United States Circuit Judge, you indicated that you would provide further information for the record on two points. Since the Judiciary Committee has not received any additional submissions from you since the hearing, I am writing to call these matters to your attention.

First, I asked at the hearing whether you had participated in any cases before the Ninth Circuit Court of Appeals. You replied that you had probably participated in one such case, the Petaluma case, and said that you would provide the citation. This exchange appears on pages 35-36 of the unedited hearing transcript, which the Committee has provided to you.

Second, I asked for your comments on an article which appeared in the New York Times on January 29, 1988, which included observations by Judge Frank Coffin and other federal judges on the question of precedent. You replied that you were familiar with the article, and that you would give the Committee your reaction to it. This exchange appears on pages 76-78 of the hearing transcript. For your convenience, I enclose a copy of the article in question.

The Committee has also received, and has included in the hearing record, a letter from former Judge Shirley Hufstedler which addresses the same issues discussed in the New York Times article. You may wish to include your reaction to this letter in your response to the article. I enclose a copy.

I also enclose several written questions submitted by members of the Judiciary Committee, and ask that you respond to them in writing in order to supplement the hearing record.

Finally, in order to supplement the hearing record on your litigation experience, please describe briefly any cases in which you have participated in any appellate court, state or federal, by filing a brief or offering oral argument. Please include the caption of the case, and, if the appellate decision has been reported, the citation. Your response need not duplicate any information you provided in response to the Committee's questionnaire, nor in response to my inquiry about the Petaluma case.

Thank you in advance for your prompt attention to these requests.

Sincerely,

Patrick Leahy

PATRICK LEAHY
United States Senator

enclosures